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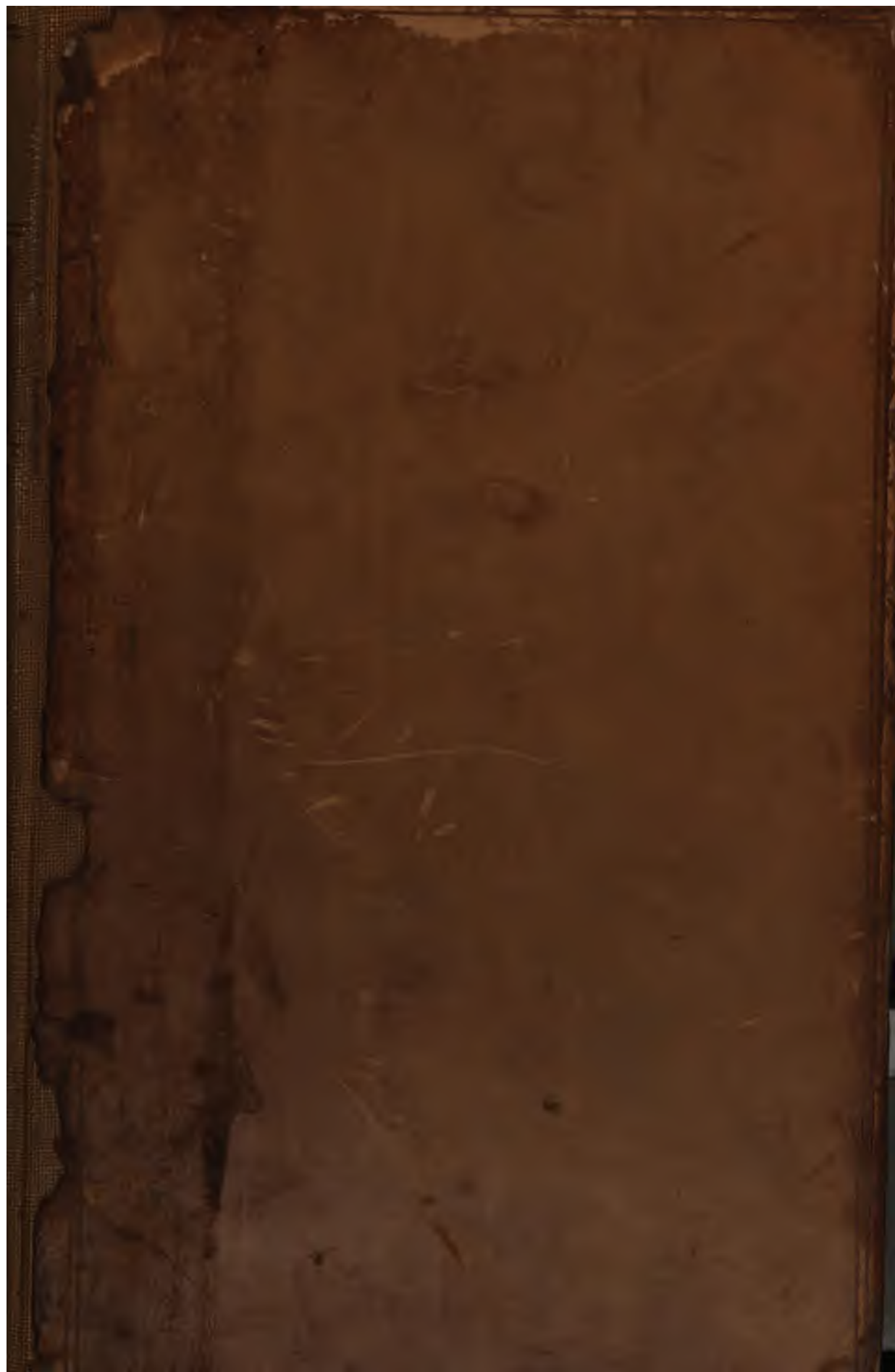
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R E P O R T S

OF

C A S E S

ARGUED AND DETERMINED

IN

The Court of Queen's Bench.

WITH TABLES OF THE NAMES OF THE CASES ARGUED
AND CITED, AND THE PRINCIPAL MATTERS.

BY

JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE,

AND

THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,

ESQRS. BARRISTERS AT LAW.

VOL. X.

CONTAINING THE CASES OF EASTER AND TRINITY TERMS AND
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IN THE SECOND AND THIRD YEARS OF VICTORIA.

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J U D G E S
OF
THE COURT OF QUEEN'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

The Right Hon. THOMAS LORD DENMAN, C. J.
Sir JOSEPH LITTLEDALE, Knt.
Sir JOHN PATTESON, Knt.
Sir JOHN WILLIAMS, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEY GENERAL.
Sir JOHN CAMPBELL, Knt.

SOLICITOR GENERAL.
Sir ROBERT MOUNSEY ROLFE, Knt.

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ERRATA.

Page 87. line 21. for "plaintiff" read "defendant."

219. note (c) read the second reference as follows : — "*S. C.* (as *Worts v. Chyston*)
Cro. Jac. 350."

225. marginal note, insert "on his own application."

305. note (a), add "211."

329. last line but four, for "plaintiff in error" read "plaintiffs below."

331. add the following note to line 25. : — "*Simpson v. Lord Howden*, 3 *Myl. &*
Cr. 97. is probably the case alluded to."

470. marginal note, last word but one, for "were" read "was."

494. marginal note, and through the case passim, for "23 *H. 6. c.* 10." read
"23 *H. 6. c.* 9."

685. line 15. }
695. line 26. } for "*Clinton*" read "*Clint.*"

C A S E S

ARGUED AND DETERMINED

1839.

IN THE

Court of QUEEN's BENCH,

AND

UPON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

Easter Term,

In the Second Year of the Reign of VICTORIA.

The Judges who usually sat in Banc in this Term were,

LORD DENMAN C. J.	PATTESON J.
LITLEDALE J.	COLERIDGE J.

MEMORANDA.

MR. *Baron Bolland* having resigned his seat in the Court of Exchequer, *William Henry Maule*, of *Lincoln's Inn*, Esquire, one of her Majesty's counsel, was, in last *Hilary* vacation, appointed a Baron of that Court, having first been called to the degree of the coif, when he gave rings with the motto "*Suum cuique*." He afterwards received the honour of knighthood.

VOL. X.

B

In

1839. In the same vacation *William Goodenough Hayter*, of *Lincoln's Inn*, Esquire, received a patent of precedence; and *John Stuart*, of *Lincoln's Inn*, Esquire, *Samuel Girdlestone*, of the *Middle Temple*, Esquire, *Robert Vaughan Richards*, of the *Inner Temple*, Esquire, and *Griffith Richards*, of the *Inner Temple*, Esquire, were appointed her Majesty's counsel.

Edmund Henry Lushington, Esquire, her Majesty's coroner and attorney in this Court, died in the same vacation, and, on the 18th of *April*, *Peregrine Dealtry*, Esquire, secondary on the Crown side of this Court, having been appointed to succeed him, produced in Court her Majesty's letters patent granting him the said office, and was thereupon sworn in, and took his seat.

The cases of this term (with the exception of *Stead v. Dawber*) are reported by Mr. *Adolphus* and Mr. *Smirke*, jointly.

1839.

The QUEEN *against* The LONDON and SOUTH-
AMPTON Railway Company.

Tuesday,
April 16th.

CHANNELL, in *Michaelmas* term, 20th [November, 1837, obtained a rule nisi for a mandamus to the above company to issue a warrant to summon a jury for the purpose of assessing the sum to be paid to Messrs. Francis and Sons for the purchase of their interest in premises taken by the company under their act, 4 & 5 W. 4. c. lxxxviii. (local and personal, public), and for compensation by reason of such taking.

Sect. 47. of that statute enacts, that "all tenants at will, lessees for a year, tenants from year to year, and other persons in possession of any lands which shall be intended to be taken or used for the purposes of this act, and who shall have no greater interest in the lands than as tenants at will, or lessees for a year, or as tenants from year to year, shall respectively deliver up the possession of such lands to the said company, or to such persons as they shall appoint to take possession of the same, at the expiration of six calendar months next after notice to that effect shall have been given by the said company to such respective tenants or lessees or persons in possession, or left upon the said lands, whe-

The London and Southampton Railway Act (4 & 5 W. 4. c. lxxxviii.) provides that all tenants from year to year shall deliver up possession to the company at the expiration of six calendar months next after notice, whether such notice be given with reference to the commencement of the tenancy or not, and whether before or after the purchase of the lands by the company; or at such time after the expiration of the notice as they shall be required; and that where any such tenant shall be required to give up possession before the ex-

piration of his term or interest, the company shall make compensation for the value of his unexpired term or interest. On 10th *January* the company gave six months' notice under the act to a tenant from year to year, whose holding began at *Christmas*: after the expiration of the notice, the tenant, who had refused to quit without compensation, was told by the company that possession would not be required till *Christmas*: the company did not take a conveyance of the reversion till 25th *August*.

Held, that the tenant, who voluntarily continued to occupy as usual till *Christmas*, was in the same situation as if a regular landlord's notice had been originally given to him, and was therefore not entitled to compensation.

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ther such notice be given with reference to the time of the commencement of such tenant's holding or not, and whether such notice be given before or after the said lands shall be purchased by the said company; or at such time after the expiration of six calendar months from the giving or leaving of such notice, as they shall be respectively required," &c. On refusal, the company is authorised to issue a precept to the sheriff to deliver possession. By sect. 48 it is enacted, that where any such tenant or lessee shall be required to deliver up the possession of lands so occupied by him before the expiration of his term or interest therein, the company shall make or tender to him, before they issue their precept to the sheriff to give possession of the lands, compensation or satisfaction for the value of his unexpired term or interest therein, such compensation, &c., in case of difference, to be ascertained by a jury in the usual way.

It appeared by the affidavits in support of the rule, that Messrs. *Francis*, marble merchants, had been tenants, for nearly twenty years, of the premises in question, under a tenancy from year to year, commencing at *Christmas*; that their landlord owned a large estate in the neighbourhood, including these premises, chiefly occupied by yearly tenants, and had never been known to remove a tenant who paid his rent regularly. Messrs. *F.* used the premises for carrying on their business, and had laid out large sums in improving them. On 10th *January* 1837 the secretary of the company signed and served the following notice upon Messrs. *F.* touching the said premises:—"In pursuance of the provisions contained in an act of parliament passed" 4 & 5 *W. 4.*, "entitled An Act for making a Railway from *London to Southampton*, I do hereby, on behalf

behalf of the *London and Southampton* Railway Company, give you notice that all that piece or parcel of ground, and all those several messuages" &c. (describing the property in question), situate &c., distinguished by the No. 6. in the map &c., "and now in your occupation, will be wanted and required for the purposes of the said act; and I hereby, on behalf of the said company, give you notice to deliver up the possession thereof to the said company, or to such persons as they shall appoint to take possession of the same, at the expiration of six calendar months next after this notice; and I further give you notice on behalf of the said company, that the said company are willing to give you compensation for any unexpired term or interest you may have in the said premises at the end of six calendar months from this notice; and that if for the space of ten days next after service hereof you shall neglect or refuse to treat, or shall not agree with the said company for the amount of such compensation," (notice that in that event the company would cause a jury to be summoned to assess compensation). After the expiration of six months from the delivery of this notice, the secretary informed Messrs. *Francis* that the company were then the landlords of the premises, and that Messrs. *F.* were trespassers on account of their neglect to remove pursuant to the notice, and demanded possession, and required them to give an immediate answer whether they would remove or not. Messrs. *F.* stated their willingness to remove, on being paid compensation for the same, which the company declined to do.

The affidavits on the part of the company stated, that at the time of serving the above notice on the 10th of *January*, they and their agents believed that the tenancy

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of Messrs. *Francis* was a yearly tenancy expiring at *Michaelmas*, and they accordingly notified to Messrs. *F.* that, although they had given a formal notice to quit at the end of six months, it was not their intention to disturb Messrs. *F.* in their possession until *Michaelmas*. The company became the legal owners of the reversion by a conveyance on 25th *August*. On the 30th *September* possession was duly demanded on behalf of the company; but no compensation was offered, (although negotiations had been and still were pending between the agents of the parties on the amount thereof,) inasmuch as the company were advised that none could of right be claimed, if possession was not demanded until the regular expiration of the tenancy. Messrs. *F.* refused to quit unless compensation was paid. It afterwards came to the knowledge of the company's agents that the tenancy was one that would expire at *Christmas*, and not at *Michaelmas*; whereupon Messrs. *F.* were informed that possession would not be required until *Christmas* in the same year. It was further alleged, that from the time of the notice in *January* 1837 until the following *Christmas*, Messrs. *Francis* continued in possession of the premises, and carried on business there as usual, until they began to remove, a few days before *Christmas*; that such removal would not have occasioned any greater loss or inconvenience to them than they would have suffered by removal under any other circumstances; and that at the period of their applying to this Court for a mandamus they had, in fact, suffered none whatever. In this term (*a*)

(a) *Tuesday, April 16.* Before Lord Denman C. J., Littleale, Patteson, and Coleridge Js.

Sir

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be no ground for compensation under that act; *Rex v. The Liverpool and Manchester Railway Company (a)*.

J. Jervis and Channell, contra. The company had it in their power either to proceed as they have done, availing themselves of a notice given under the authority of the act, in which case compensation is due; or to give a regular notice, as landlords, to quit at *Christmas*, which has not been done. As landlords, they could not have compelled their tenants to quit till *Christmas* 1838; the latter are therefore entitled to be indemnified for the loss of so much of their unexpired term or interest. At all events they have a right to compensation for the period between 10th *July* and *Christmas* 1837. They refused to give up possession after the notice expired, because compensation was not tendered agreeably to sect. 48; and though it is true that the company attempted to countermand their notice, and assumed the character of landlords after they had purchased the reversion, it has been decided in *Rex v. The Hungerford Market Company, ex parte Davies (b)*, and in a previous case there mentioned, that such notice cannot be retracted so as to deprive the tenant of his indemnity, otherwise the tenant might be left in uncertainty, and at the mercy of the company, during the whole number of years allowed to them for the exercise of their compulsory right.

Cur. adv. vult.

Lord DENMAN C. J. in the same term (*Wednesday, May 1.*) delivered judgment as follows:

This was a rule for a mandamus, on the part of

(a) 4 A. & E. 650.

(b) 4 B. & Ad. 327.

Messrs.

Messrs. *Francis*, to obtain compensation under the 47th and 48th sections of stat. 4 & 5 W. 4. c. lxxxviii. establishing the *Southampton* Railway Company. The language of those sections is substantially the same as that of the act establishing the *Liverpool* and *Manchester* Railway Company, and the case of *Rex v. The Liverpool and Manchester Railway Company* (a) is a strong authority upon the subject. In that case the claimants held under a lease for seven years, having a reasonable expectation of renewal, but no covenant or agreement to that effect: the company gave a six months' notice under the act, which expired at the same time as the term of seven years, and it was held, that the claimants had no right to any compensation.

Here the claimants were tenants from year to year commencing at *Christmas*. The company, in *January* 1837, gave a six months' notice under the act, supposing, erroneously, that the claimants held from *Michaelmas*. On discovering the error, they gave notice that the premises would not be wanted till *Christmas*. The claimants did not quit in *July*, nor indeed at *Christmas*. At the time of the notice in *January*, the company had not purchased the landlord's interest, but they did so before *July* (b), and before they gave notice that the premises were not wanted till *Christmas*. Now, if the claimants had quitted in *July*, they would undoubtedly have been entitled to *some* compensation, but as they have chosen to hold over beyond *Christmas*, at which time they might have been compelled to quit by the

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(b) It was stated in argument that the purchase was made between 10th *January* and 10th *July*: the conveyance was on 25th *August*. The fact, that the claimants had not quitted at *Christmas*, did not appear by the affidavits, but was asserted in the course of argument.

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ordinary landlord's notice without compensation, it is said that they are not entitled to anything. On the other hand, it is contended that the tenancy has never been determined, because no regular landlord's notice was given; that the situation of the tenants was materially altered by the six months' notice given in *January*, and their possession rendered wholly uncertain from day to day after the expiration of those six months.

We cannot think that the act of parliament requires two notices in the case of a tenancy from year to year; but the true construction is, that the company might either give the ordinary landlord's notice ending with the current year of the tenancy, in which case no compensation would be due, or six months' notice under the act, to be given at any time, in which case the tenant would be entitled to compensation for the value of the term between the expiration of the six months' notice and the time when a regular landlord's notice would have expired. But in order to entitle the tenant to such compensation, the premises must be given up. If, as in this case, the company inform the tenant that he may hold them till the end of the current year, and he chooses so to do, the situation of the parties is the same as if a regular landlord's notice had been originally given, and the tenant is entitled to no compensation, because he has voluntarily retained the possession.

It makes no difference that the company were not landlords when they gave the notice in *January*; that notice was undoubtedly meant to operate under the act, and would have done so but for the subsequent conduct of the parties. Under these circumstances, we are of opinion that this rule must be discharged.

Rule discharged.

1839.

NEWMAN *against* BENDYSHE and METCALFE, *Tuesday,*
Clerk. *April 16th.*

TRESPASS for taking plaintiff's cart and detaining it till payment of money. Plea (by statute), not guilty.

The cause was tried at the last Lent assizes at *Cambridge*, before *Tindal C. J.*, and the plaintiff had a verdict. Leave was reserved to the defendants to move to enter a nonsuit, if this Court should be of opinion that the conviction, under which the defendants justified, was valid. Plaintiff had been convicted under sect. 14 of stat. 11 G. 4. & 1 W. 4. c. 64. (for the general sale of beer &c.), amended by 4 & 5 W. 4. c. 85.; and the cart was seized as a distress for the penalty and costs. The conviction was as follows:—

Cambridgeshire, to wit. Be it remembered that, on &c., *Robert Newman*, of &c., was duly convicted before us *J. B. Esq.* and the *Rev. W. M.*, clerk, two of her Majesty's justices of the peace in petty sessions for the division of *Arrington* in the said county, for that he, the said *R. Newman*, being a person licensed under the provisions of an act of parliament made and passed 1 W. 4., entitled "An act to permit the general sale of beer and cider by retail in *England*," and also under the provisions of another act of parliament made and passed 5 W. 4., entitled "An act" &c. (to amend the preceding act), to sell beer by retail in the house occupied by him in the parish of *Haslingfield*, and within the

Where a conviction under sect. 14 of stat. 11 G. 4. & 1 W. 4. c. 64. (for the general sale of beer &c.) purported to charge the party with the offence of keeping his house open for the sale of beer, and selling beer, and suffering the same to be drunk and consumed in the house at an unlawful time, and convicted him in the penalty of 40s. as upon a single offence.

Held, that the conviction was bad, because it included more than one distinct offence; and that trespass lay for levying the penalty by distress.

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the division &c., “*did, on Wednesday the 6th day of June last &c., between the hours of nine and ten of the clock in the evening, keep open the said house in the said parish of Haslingfield for the sale of beer, and did, on the day and at the time last aforesaid, sell beer, and suffer the same to be drunk and consumed in such house, such time having been declared to be unlawful by an order of her Majesty’s justices of the peace for the said county made at a special sessions holden for the division of A. aforesaid, on*” &c. in pursuance of the said hereinbefore mentioned act (5 W. 4.), by which said order the said justices did among other things fix, that the hour at which houses and premises licensed to sell beer under the said last-mentioned act of parliament within the said division of A. should be closed should for the year then ensuing be the hour of nine of the clock in the evening, excepting in *July, August, and September, and on Sundays*, “and which said order was not appealed against, and has not been altered, and is still in force, and notice thereof had been duly served on the said *R. Newman*, previous to the commission of *the said offence*; the said keeping open the said house for the sale of beer, and selling beer and suffering the same to be drunk and consumed therein at the time above charged and specified, being contrary to and in breach and transgression of the conditions and provisions of the license granted to the said *R. Newman* for the sale of beer by retail; whereby the said *R. Newman* has forfeited the sum of 40s., this being adjudged to be his *first offence* against the provisions of the said acts of parliament hereinbefore mentioned, besides the costs of this conviction,” which costs were assessed under the statute at 1*l.* 18*s.* 4*d.* Then followed a distribution of

of the penalty, and direction for payment of costs to the prosecutor (a).

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Kelly now moved for a rule nisi to enter a nonsuit. On the trial seven objections were made to the con-

(a) The following are the clauses of the acts under which the conviction took place: —

11 G. 4. and 1 W. 4. c. 64. s. 14. enacts, "That no person licensed to sell beer by retail under this act shall have or keep his house open for the sale of beer, nor shall sell or retail beer, nor shall suffer any beer to be drank or consumed in or at such house, at any time before the hour of four of the clock in the morning nor after ten of the clock in the evening of any day in the week, nor at any time between the hours of ten of the clock in the forenoon and one of the clock in the afternoon, nor at any time between the hours of three and five of the clock in the afternoon, on any *Sunday*," &c. (naming certain other days), "and if any such person shall keep his house open for selling beer, or shall sell or retail beer, at any time after the hour of ten of the clock in the evening or before the hour of four of the clock in the morning of any day, or between the hours of" &c. "on any *Sunday*" &c. "such person shall forfeit the sum of 40s. for every offence; and every separate sale shall be deemed a separate offence."

Stat. 4 & 5 W. 4. c. 85. s. 6. enacts, "That it shall be lawful for the justices of the peace of every county, riding, division, franchise, liberty, city, town, and place, in petty sessions assembled, and they are hereby required, to fix once a year, within thirty days after the passing of this act in this year, and in every future year, in the counties of *Middlesex* and *Surrey* within the first ten days of the month of *March*, and in every county on some day between the 20th day of *August* and the 14th day of *September* inclusive, the hours at which houses and premises licensed to sell beer under this act shall be opened and closed.

Sect. 11 enacts, "That all the powers, regulations, proceedings, forms, penalties, forfeitures, and provisions contained in the said recited act with reference to persons licensed under the said act, and to the offences committed by such persons against the said act, or against the tenor of any licence granted under the said act, and also with reference to the sureties of such persons, and to persons doing the things thereby prohibited without the licence required by the said act, shall (except where they are altered by this act or are repugnant thereto) be deemed and taken to be applicable to all persons licensed under this act, and to all offences committed by such persons of the same description as the offences mentioned in the said act" &c., as fully as if all the said powers, penalties, &c. had been repeated and re-enacted in this act with reference to persons licensed under this act, &c.

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viction. 1. It does not state to whom the beer was sold. This is unnecessary. The parties might not choose to mention their names. Selling per se is an offence; it matters not to whom. In *Newman v. The Earl of Hardwicke* (a), where the offence was permitting beer to be consumed on the premises, it was not objected to the conviction that the parties consuming were not named. 2. The justices who made the order under sect. 6 of 4 & 5 W. 4. c. 85. are not named. This might be an objection to the order itself; but here the order is not disputed, and is stated, in the conviction, not to have been appealed against. 3. The conviction states that the house was open, &c. at a time "declared to be unlawful by an order" &c., and it is objected that the act gives no power to declare the illegality. The answer is that, at all events, it sufficiently appears that the order fixed the times of opening and closing, and a violation of the order is illegal. The declaration of illegality is at most mere surplusage (b). 4. The order is not said to have been made at the petty sessions. The conviction calls it a *special sessions*; in fact any session is a petty session, if it be not a general session; *Regina v. Rawlins* (c). 5. The time of keeping open house is not specified with precision, but is stated to have been "between the hours of nine and ten" in the evening. It is, however, enough to shew that the time was after nine o'clock. 6. It is objected that the whole order of justices should have been set out; but this cannot be

(a) 8 A. & E. 124.

(b) The form of licence in the schedule of 4 & 5 W. 4. c. 85., uses the words "at any time which by any order of the justices made in pursuance" &c. (of that act) "shall be declared to be unlawful."

(c) 8 C. & P. 439.

necessary,

necessary, if the conviction shews so much of it as the plaintiff transgressed. 7. The last objection is that the conviction includes three distinct offences, viz. keeping the house open for the sale of beer; selling beer; and suffering beer to be drunk and consumed in the house; and that these several offences should not be included in one conviction. But the offence charged is substantially one act. The several acts are the consequences of the first. The consumer buys at the house kept open for sale. *Rex v. Salomons (a)*, which may be relied on by the plaintiff, is rather an authority for the defendants. There the conviction charged the "offence" of dealing in lottery tickets and registering them without licence, which were held to constitute two offences; whereas if the reasoning of the plaintiff is good, there were four offences charged; viz. keeping an office for dealing in tickets; dealing in them; keeping an office for registering; and registering them. The Court must have treated the offences immediately connected with each other as one; viz., the keeping an office for doing a thing, and the doing of it. [Lord Denman C. J. May not a person keep his house open without selling?] It is laid as one act and one offence, and a single penalty only imposed. The statement is not vitiated by introducing acts connected with and involved in it. A publican who suffers his beer to be drunk in his house must of necessity keep it open, and must have supplied the beer which his customer drinks in the house. If he had been alleged to have merely suffered the beer to be drunk, it might have been objected that it was drunk by his own family; but here the additional

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(a) 1 T. R. 249.

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statement clears the charge of ambiguity, and shews the act to be illegal. [*Littledale J.* Sect. 14 of stat. 11 G. 4. & 1 W. 4. c. 64. imposes no penalty on the offence of suffering beer to be consumed (a)]. That rather helps the conviction, by removing one of the grounds of uncertainty. At all events, the conviction is now aided by sects. 25 and 27, which give the general form pursued in this case, and provide that want of form shall be no objection.

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day of this term (*Saturday 20th April*), stated the judgment of the Court that the conviction was bad, on the ground relied upon in the seventh objection; viz., that it charged the plaintiff with more than one offence against the statute, for which he might have been distinctly convicted.

Rule refused.

(a) But see sects. 13 & 15 of stat. 11 G. 4. & 1 W. 4. c. 64.; sects. 11 and 4 of stat. 4 & 5 W. 4. c. 85., and the form of license in the schedule to that act.

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HORNER *against* KEPPEL.Wednesday,
April 17th.

DECLARATION on a bill of exchange by third indorsee against acceptor, averring notice to defendant of the premises in the declaration, agreeably to the form in the schedule *Reg. Gen. Trin. 1 W. 4. (b)*. Plea; that defendant had no notice of the indorsement of the bill before it became due, nor did he, at the time of the indorsement, promise to pay the amount according to the tenor and effect thereof, nor did plaintiff pay to his indorser the whole amount thereof as the consideration. Verification. Special demurrer. The defendant was not under terms to plead issuably.

In an action by indorsee against acceptor, defendant pleaded that he had no notice of the indorsement; that he did not promise to pay; and that plaintiff had not paid the whole consideration. The Court refused to set aside the plea as a nullity upon motion.

Where a plea is clearly frivolous, the Court will set it aside, although the defendant is not under terms to plead issuably (a).

Theobald moved for a rule to shew cause why the plea should not be set aside, and the plaintiff sign judgment as for want of a plea. The want of notice and of consideration are wholly immaterial, and the denial of a promise is no longer permitted by the new rules of pleading. The plea, too, attempts to put several facts in issue. It is therefore clearly insufficient, and ought to be treated as a nullity. The practice has not been uniform, in cases where the defendant is not under terms to plead issuably. In *Cowper v. Jones* (c), *Patteson J.* is stated to have denied the authority of the Court to interfere in such cases, except under special circumstances. In *Miley v. Walls* (d) the Court of Ex-

(a) See the next two cases.

(b) 2 B. & Ad. 785.

(c) 4 Dowl. P. C. 591.

(d) 1 Dowl. P. C. 648. S. C. 2 Law Journ. 170. (Exch.) N. S.

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chequer seem, at first, to have doubted whether a plea of no consideration by an acceptor could be treated as a nullity; but they afterwards set aside the plea on the ground of its being false in fact. Sham pleas have often been set aside and judgment signed accordingly; *Richley v. Proone (a)*, *Smith v. Hardy (b)*; although *Merington v. Becket (c)* is contrary. So repugnant pleas have been considered to be nullities, where the defendant was under terms; *Serle v. Bradshaw (d)*. Bad pleading in delay of justice has always been treated as a contempt, and the fines for it once formed a source of revenue to the crown; *Com. Dig., Prerogative (D 52.)*. It is very desirable that the Court should interfere in a summary manner to prevent pleading for delay.

LORD DENMAN C. J. I would not willingly renounce any of the jurisdiction of this Court; but, on the other hand, we must not enlarge it, or multiply cases for its interference. Where a plea is clearly frivolous on the face of it, that is a good ground for setting it aside; but the plea here is not quite bad enough to warrant that remedy.

LITLEDALE J. Where the plea is contrary to a rule of Court, or wholly inapplicable to the cause of action, the Court will set it aside; but here the plea traverses allegations in the declaration, which are found in the forms prescribed by a rule of the Court.

PATTESON J. If I, in *Cowper v. Jones (e)*, repudiated any authority to treat a bad plea as a nullity, I was wrong.

(a) 1 B & C. 286.

(b) 8 Bing. 435.

(c) 2 B. & C. 81.

(d) 2 C. & M. 148.

(e) 4 Dowl. P. C. 591.

COLERIDGE J. There may be a distinction between a plea bad in law, and a plea false in fact. Some of the cases cited refer to the latter fault. The present plea is objected to on the first ground, on which we should certainly be slow to interfere; though where such pleas are put in for delay alone, it is to be regretted that the members of a liberal profession should lend themselves to so unjust an object.

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Rule refused (a).

(a) On the last day of this term, *Theobald* moved for a rule nisi that judgment be given for the plaintiff on the demurrer, and founded his application on *Haworth v. White* (1 *Arnold's Rep.* 278.), where, in a similar case, the Court of Common Pleas allowed the argument to be accelerated in order to defeat the attempt at delay on the part of the defendant. The Court refused the rule, but intimated their intention of including the case among others which they meant to set down for argument at an early day. In *Michaelmas* term, 1839, the Courts of Common Pleas and Exchequer set aside frivolous pleas to actions on bills of exchange, where the defendant was not under terms; *Balmanno v. Thompson* (6 *New Ca.* 153.), *Bradbury v. Emans* (5 *M. & W.* 595.)

KNOWLES *against* BURWARD.
 Wednesday,
April 17th.

ASSUMPSIT on two bills of exchange, by second indorsee against acceptor. Account stated. Plea, to the count on one of the bills, that the drawer did not, at the time of making or of accepting the said bill, pay to defendant the sum mentioned in the said bill, as and for the consideration of defendant's acceptance

Action on two bills of exchange by indorsee against acceptor. Plea, as to one bill, no consideration between drawer and defendant: as to the other, no consideration

paid by plaintiff to defendant. The Court set aside the pleas, with costs, and allowed plaintiff to sign judgment, although defendant was not under terms (a).

(a) See the next case.

1839. thereof. Verification. Plea to the count on the second bill; that plaintiff did not at the time of making or accepting &c., pay to defendant the sum mentioned in it as and for the consideration of defendant's acceptance. Verification. Plea to the last count, non assumpsit.

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Humfrey, in this term, obtained a rule to shew cause why the pleas pleaded in the cause should not be set aside with costs, and the plaintiff be at liberty to sign judgment. An affidavit was put in by the plaintiff's attorney, stating that there was a valuable consideration for the indorsement to the plaintiff, and that he verily believed the defendant had no defence, and had pleaded for delay. On the last day of this term (*Wednesday 8th May*),

Edwards shewed cause upon an affidavit stating that defendant was not under terms to plead issuably; that the facts stated in the two pleas as to the bills were true; and that *Littledale J.* had already refused to make the same order. He cited *Horner v. Keppel (a)*, and contended that there were three classes of cases only in which judgment may be signed as for want of a plea; 1st., where the plea is a sham plea, and proved to be such by affidavit; 2dly, where the plea is absurd and impossible on the face of it; 3dly, where the plea has tendered issues to different jurisdictions; and he referred to *Cowper v. Jones (b)* and the cases mentioned in the note to *Idle v. Crutch (c)*. The pleas here are not absurd, for if a bill be an accommodation bill, the action

(a) *Antè*, p. 17.

(b) 4 *Dowl. P. C.* 591.

(c) 1 *Chit. Rep.* 524.

may

may be defeated by shewing that the indorsee gave no value for it.

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Humfrey, contra. The doubts attributed to *Patterson J.* in *Cowper v. Jones* (a) were disowned in *Horner v. Keppel* (b).

Lord DENMAN C. J. In *Horner v. Keppel* (b), the defendant traversed an averment inserted in the declaration on the authority of a rule of this court. The matters pleaded here are clearly no defence. The plea is mere waste paper.

LITLEDALE, PATTESON, and COLERIDGE Js., concurred.

Rule absolute.

(a) 4 Dowl. P. C. 591.

(b) Antè, p. 17.

The following case was decided at a later period of the term.

BLACKBURN *against* EDWARDS and VENOUR.

Tuesday,
May 7th.

DEBT on a common money bond in the penal sum of 4000*l.* Plea, by defendant *Edwards*, that the plaintiff ought not further to maintain his action, because Debt on bond against *A.* and *B.* Defendant *A.*, being under terms to plead issuably, pleaded that plaintiff ought not *further* to maintain his action, because defendants were in partnership as attorneys, and, after the commencement of the suit, in consideration that defendant, at the request of plaintiff and of defendant *B.*, would dissolve the partnership, plaintiff agreed to forbear all further proceedings in the action; and the partnership was dissolved accordingly. Plaintiff signed judgment as for want of a plea. On motion to set aside the judgment, the Court discharged the rule with costs. (a)

(a) See the two preceding cases.

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before, and at the commencement of the suit, and at the time of making the promise and agreement hereinafter mentioned, to wit, on &c., the defendants carried on, in copartnership together, the business of attorneys at *Leamington* &c., for a certain time then unexpired; and thereupon after the commencement of this suit, to wit, on &c., in consideration that defendant *Edwards*, at the request of plaintiff and *Venour* (the other defendant) would dissolve the said copartnership, the plaintiff undertook, agreed, and promised to forbear all further proceedings in the said action: that defendant *Edwards*, confiding in such undertaking &c., did afterwards dissolve the said copartnership, and the same was accordingly then put an end to by and between the defendants. Verification.

The defendants being under terms to plead is-
suably, the plaintiff signed judgment as for want of a plea.

R. V. Richards now moved to set aside the judgment so signed.

Whately shewed cause in the first instance, and contended that the plea was frivolous, a parol agreement being no answer to an action on a specialty; *Littler v. Holland* (a), *Brown v. Goodman* (b). He also cited *Staples v. Holdsworth* (c), and note (1) to *Fowell v. Forrest* (d). No material issue could be taken on this plea.

(a) 3 T. R. 590.

(c) 4 New Ca. 144.

(b) 3 T. R. 592. note (b).

(d) 2 Wms. Saund. 47 s.

R. V. Richards,

R. V. Richards, in reply. The plea does not attempt to deny the forfeiture of the bond; it is merely in bar of the *further* maintenance of the action.

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Per Curiam, (a)

The plea is clearly frivolous. To be an issuable plea, it must admit of an issue being taken on some material fact. Here no such issue could be taken.

Rule discharged with costs.

(a) Lord Denman C. J., Littledale, Patteson, and Coleridge Js.

BARSHAM *against* BULLOCK.

Wednesday,
April 17th.

DEBT for penalties against the Sheriff of *Essex*, for causing plaintiff, whom he had arrested by virtue of a writ of *capias*, to be conveyed and carried to a public drinking-house, without the free and voluntary consent of the plaintiff. Plea (among others) that defendant did not cause plaintiff to be conveyed or carried to a public drinking-house without his free and voluntary consent, *modo et formâ*; and issue thereupon (a).

To a penal action on 32 G. 2. c. 28. ss. 1. 12. against the sheriff for carrying a party arrested by him to a tavern, without his free and voluntary consent, defendant pleaded that he did not carry the plaintiff to a tavern without his free and voluntary

On

consent, *modo et formâ*. Held, on issue joined thereon, that as the plea admitted an arrest by the defendant, and as the evidence shewed the arrest to have been made by the same officer who carried the plaintiff to the tavern, there was no necessity for further connecting defendant with the act of the officer by proof of the warrant.

Quære, whether the plea operated as a denial both of the carrying to the tavern, and of the consent; or only of the consent?

While the officer was illegally carrying the party to gaol within twenty-four hours after arrest, the prisoner, to avoid being taken to gaol, consented to go to a tavern, and there draw up an agreement for the purpose of getting discharged: Held, that a consent so obtained was not free and voluntary within the statute, and that the plea was properly negatived by the jury.

(a) The action was on sect. 1 of 32 G. 2. c. 28., which enacts "that no sheriff, under-sheriff, bailiff, serjeant at mace, or other officer or

minister

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On the trial before Lord *Denman* C. J. at the *London* sittings, after *Hilary* term 1839, it appeared that the sheriff's officer, who had arrested the plaintiff, was illegally conveying him to gaol within twenty-four hours after the arrest, when the plaintiff, in order to avoid being carried to gaol, consented to go to a tavern, and there to execute an agreement with his creditor for the purpose of procuring his discharge. It was contended, on the part of defendant, that this was evidence of consent, and that, at all events, the warrant should be produced, in order to fix the defendant with the act of the officer. The Lord Chief Justice overruled the latter objection, and told the jury that, if the plaintiff merely preferred being taken to the tavern to going to gaol, and submitted to it as the less evil of the two, the plea was not supported. The jury found for the plaintiff.

Sir *J. Campbell*, Attorney-General, now moved for a rule nisi to enter a nonsuit on the grounds relied upon at the trial. The plea puts in issue both the carrying to the tavern and the want of consent. The arrest is indeed admitted, but a mere stranger may have conveyed the plaintiff to the house. The warrant must be

minister whatsoever, shall at any time or times hereafter convey or carry, or cause to be conveyed or carried any person or persons by him or them arrested, or being in his or their custody by virtue or colour of any action, writ, process or attachment, to any tavern, ale-house, or other public victualling or drinking house, or to the private house of any such officer or minister, or of any tenant or relation of his, without the free and voluntary consent of the person or persons so arrested or in custody; "nor shall carry any such person to any gaol or prison within four and twenty hours from the time of such arrest, unless such person or persons so arrested shall refuse to be carried to some safe and convenient dwelling-house of his, her or their own nomination or appointment" &c.

Sect. 12. imposes the penalty, and gives an action for its recovery.

produced

produced to shew that this was not the case ; *George v. Perring (a)*. Then, as to consent, the facts are cogent evidence of it; for the plaintiff went to the tavern to draw up an agreement for his own discharge, and there was no illegality in taking the plaintiff *towards* the gaol.

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LORD DENMAN C. J. There is no pretence for saying that this was a free and voluntary consent. It is mere duress and an abuse of office. The plaintiff, finding himself about to be forcibly carried to gaol, submits to be conveyed to the tavern in preference to the gaol. The jury found instantly that it was not a free and voluntary consent.

LITLEDALE, PATTESON, and COLERIDGE Js. concurred.

As to the other point,

Cur. adv. vult.

LORD DENMAN C. J., on a subsequent day of this term, delivered judgment as follows : —

The question in this case, upon which we took time to consider, is, whether the defendant, the sheriff of *Essex*, was sufficiently connected by the evidence with the person who did the act complained of, without production of the warrant. The third count of the declaration, on which the question arises, charges the defendant with having taken the plaintiff, whom he had arrested for debt, to a drinking-house without his free

(a) 4 *Esp.* 63.

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consent. The plea states that the defendant did not take him to the drinking-house without his free and voluntary consent in manner and form.

Now, assuming for the sake of the argument that this plea traverses as well the fact of taking to the drinking-house by the defendant, as that it was done without the consent of the plaintiff, still it plainly admits that the defendant arrested the plaintiff; it adopts the act of the officer in arresting him; and it was not necessary to produce the warrant in order to shew that arrest to be the act of the defendant. The plea admits the officer, who arrested, to be the agent of the defendant for that purpose. Then the evidence shewed who that officer was, and that the same officer took the plaintiff to the drinking-house; and it being admitted that he was the agent of the defendant for the purpose of arresting, it follows that he must be his agent in all that he does arising out of that arrest.

In *George v. Perring (a)*, which was referred to, the person, who did the act complained of, was not the officer who arrested, and it was shewn that the warrant was neither addressed to, nor handed over to, him.

We think that the defendant was sufficiently connected with the act done, and that no rule should be granted.

Rule refused. (b)

(a) 4 *Esp.* 63.

(b) See *Silk v. Humphery*, 4 *A. & E.* 959.

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SUTTON and Others *against* TATHAM.Thursday,
April 18th.

ASSUMPSIT for the work and labour &c. of plaintiffs done and bestowed by them as the brokers and agents of and for defendant on his retainer and at his request, and for commission and reward due from defendant to plaintiffs in respect thereof. Counts for money paid, and on an account stated. Plea, non assumpsit. On the trial before Lord Denman C. J., at the sittings in London after last Hilary term, the following facts appeared:—The defendant had employed the plaintiffs as brokers, and had dealings with them in stock and shares for three or four years. On May 28th, 1838, he gave directions to the plaintiffs to sell for him 250 shares in the *South Australian Company*. They accordingly, on May 29th, sold 109 such shares to *Wells*, a broker, and advised defendant thereof by letter of that day; and on May 30th, they sold *Wells* 100 more such shares. On the same day the defendant came to the plaintiffs' counting-house, and said that there had been a mistake, and that he had intended only to sell fifty shares. He, in fact, had not the number sold by the plaintiffs. On the following day, one of the plaintiffs, Mr. *Robert Sutton*, had an interview with the defendant, when, as was stated in evidence, the latter said "he had got into a difficulty." Sutton said, "it was an unfortunate requisite number of shares and the vendor is bound to make up the loss, if any, resulting from a difference in prices. The broker paid such difference, being unable to complete his contract and the purchaser having made good the shares at a loss. Held, that for the difference so advanced, the shareholder was liable to the broker in assumpsit for money paid. Per Lord Denman C. J., and Littledale J. A person who employs a broker on the Stock Exchange impliedly gives him authority to act in accordance with the rules there established, though such principal may himself be ignorant of the rules.

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nate mistake." Defendant asked if the bargain could not be made void? *Sutton* said "No." Defendant then said "he must leave the matter in their hands to do the best they could." Plaintiffs, on the 31st, applied to *Wells* to cancel the bargain, informing him of the mistake, but he declined, saying it was too late. The Stock Exchange is governed by rules of a committee, which are in print, and one of them is, that if the selling broker is not prepared to fulfil his contract, the purchaser may buy in shares to make up the deficiency, and charge the selling broker with any loss by difference of price. The reception of this rule in evidence was objected to, but the objection over-ruled. If the selling broker refuses to make up the difference, he is liable to be expelled the Stock Exchange. According to the usage, no principal is named by the broker on either side. The plaintiffs being unable to complete their contract, *Wells* bought in shares, according to the rule, on the best terms in his power, and there being a loss on the transaction, the plaintiffs repaid this, and broker's commission for the purchase, to *Wells*, on his demand. The present action was brought to recover this amount, and the plaintiff's brokerage on the sale of the shares to *Wells*. Sir *F. Pollock*, for the defendant, cited *Child v. Morley* (a), as shewing that a broker, having voluntarily made a payment in obedience to the rules of the Stock Exchange, could not hold his principal, a stranger to those rules, responsible for the amount. Lord *Denman* C. J. thought that in this case the principal was answerable, but, as to the loss on the second purchase, he left it to the jury to say whether the bargain for that purchase was made

(a) 8 T. R. 610.

within

within a reasonable time after the mistake was discovered; intimating his own opinion that the plaintiffs were only entitled to recover the commission, inasmuch as they did not appear to have done the best in their power for the defendant as to the repurchase. Verdict for the plaintiffs for 52*l.* 5*s.*, the amount of the two commissions.

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Sir *F. Pollock* now moved for a new trial on the ground of misdirection. The defendant must lose the commission on the sale to *Wells*, that sale having been the result of his own mistake. But the plaintiffs are not entitled to commission on the repurchase, if, by greater diligence, they could have procured the sale to be cancelled; and at all events they might have left the defendant, who was not amenable to the rules of the Stock Exchange, to adjust it for himself. If they have thought proper to comply with those rules, by which no principals are known, and brokers who have contracted to sell must, under certain penalties, deliver the amount contracted for, the defendant, who is not cognisant of the rules, ought not to bear the consequences of such compliance. The language of the Judges, particularly that of *Lawrence J.*, in *Child v. Morley* (*a*), is strongly in the defendant's favour. [Lord *Denman C. J.* I think a person employing one who is notoriously a broker must be taken to authorise his acting in obedience to the rules of the Stock Exchange. *Patteson J.* Did the defendant desire to have the purchaser's name given to him? Lord *Denman C. J.* stated the evidence on this point, as above].

(a) 8 T. R. 610.

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LITTLEDALE J. C. A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed.

PATTESON and COLERIDGE Js. concurred.

Per Curiam.

Rule refused.

Friday,
April 19th.

DRY *against* MARY DAVY.

The following guarantee was given to the firm of *M. and D.*, the actual members of which, at the time, were *M.*, *D.*, and *N.* "*G. C.* is desirous of commencing business in your line, and wants the usual credit for six months: if you think well to supply him, I will be answerable for the amount of 100*l.*"

Held, that on *N.* withdrawing from the firm (which continued under the names of *M.* and *D.*), the guarantee ceased; no intention appearing on the instrument that the responsibility should continue after such change in the partnership.

ASSUMPSIT by the plaintiff as surviving partner of *Charles Flower Mirfin*, on a guarantee alleged to have been given to the plaintiff and *Mirfin* in his lifetime. The defendant pleaded non assumpsit, and other pleas, not material here. On the trial before Lord *Denman* C. J. at the sittings in *Middlesex*, after last term it appeared that the guarantee declared upon was given to *Mirfin* and the plaintiff, then carrying on business in partnership as linen-draper, by the defendant, and was as follows.

"Messrs. *Mirfin* and *Dry*.

"Gentlemen. My son *Mr. G. C. Davy* of" &c. "is desirous of commencing business in your line, and wants the usual credit for four or six months. If you think well to supply him, I will be answerable for the amount of 100*l.* I am, &c.

"28th June 1836.

Mary Davy."

At

At this time the firm of *Mirfin* and *Dry* consisted of those persons, and a third partner named *Nicol*. Credit was given to *G. C. Davy*, as desired. *Nicol* afterwards left the firm, and *Mirfin* and *Dry* continued the business. The goods, in respect of which they now sought to enforce the guarantee, were supplied by them to *G. C. Davy* after *Nicol* left the partnership. The Lord Chief Justice was of opinion that, on *Nicol's* departure from the firm, the guarantee was at an end, and he directed a nonsuit. (a)

1899.

 DRY
 against
 DAVY.

Sir *J. Campbell*, Attorney-General, now moved for a new trial. This was a continuing guarantee to the firm of *Mirfin* and *Dry*. Being given to the firm, it was not extinguished by *Nicol's* retiring; and he could not be joined as a plaintiff, because the credit was given after he withdrew, and therefore he never had a right of action. *Pease v. Hirst* (b) shews that the guarantee was available to the firm, notwithstanding the departure of *Nicol*. *Bayley J.* says there, that "A surety bond or instrument may be so framed as to comprehend future as well as present partners." [Lord *Denman C. J.* There the instrument was a promissory note, payable to "*Pease, Harrison* and Co., or order."] It certainly makes a distinction, that the guarantee there was given by a negotiable instrument.

LORD DENMAN C. J. The language of *Bayley J.* in *Pease v. Hirst* (b), makes it an authority against these

(a) It was also contended that the guarantee, in its terms, was not a continuing one, to which point *Nicholson v. Paget*, 1 Cro. & M. 48., and *Melville v. Hayden*, 3 B. & Ald. 593., were cited.

(b) 10 B. & C. 122.

plaintiffs.

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DAY
against
DAY.

plaintiffs. He says: "Here by the form of the instrument none of the parties have placed themselves in the situation of sureties. They appear on the face of the instrument to be principals, and not to have confined their liability to the then existing partners in the banking-house, *for the note is made payable to them or order.*" And, consequently, after a change in the firm, it was held that the original payees might sue upon the note (which had not been indorsed) for the benefit of the new partners. Here the instrument was of a totally different description, and the change of partnership made an end of the guarantee.

LITTLEDALE J. The circumstance of a particular person being in the firm, may be the inducement for giving and continuing the guarantee: and there is nothing in the instrument in question to shew that that was not the case here.

PATTESON J. concurred.

COLERIDGE J. Either the guarantee was at an end, or *Nicol* should have joined in the action.

Rule refused.

Thursday,
April 19th.

TOMES v. HAWKES.

Where a verdict for the plaintiff is taken by consent at Nisi Prius, subject to a certificate, the referee may certify that a verdict shall be entered for the defendant, although no express authority to enter a verdict be given; and the certificate may be given after the assizes are over.

THIS cause being called on at the last *Northampton* assizes, was referred to a barrister. A verdict was taken for the plaintiff, and the referee was to hear the evidence and give his certificate. The counsel for both parties consented at the trial, but no order of nisi prius

was

was drawn up, nor was any rule obtained. The referee proceeded to hear the evidence on the same day, but no certificate was given until after the assizes, when the referee certified that "a verdict ought to be entered for the defendant." A verdict for the defendant was accordingly entered on the *postea*.

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Humfrey now moved for a rule to shew cause why the certificate should not be set aside. The referee had no power to direct a verdict to be entered for the defendant. A verdict can be given only by a jury, or by a power expressly created by rule of court or order of *nisi prius*. Here there was a mere *parol* submission, and no authority appears to have been given to enter a verdict for the defendant. Where certificates are given, that is invariably done during the assizes: here the assizes had been over some time.

LORD DENMAN C. J. In admitting that the verdict may be altered by a certificate during the assizes, you admit too much for your argument; for in no case is the same jury ever called upon to sanction the finding under the certificate. It is the consent of the parties alone that can supersede the finding of the jury. By such consent the finding in the certificate becomes the finding of the jury.

LITLEDALE and PATTESON Js. concurred.

COLERIDGE J. This is, in fact, a motion to set aside the verdict, disguised under the form of a motion to set aside the certificate.

Rule refused (*a*).

(a) See *Donlan v. Brett*, 2 A. & E. 344.: *Hayward v. Phillips*, 6 A. & E. 119.: *Price v. Popkin*, p. 139. post.

1839.

Monday,
April 23d.

The QUEEN against WICKHAM.

Indictment stated that defendant falsely pretended to *W.* that he, defendant, was a captain in the *East India Company's* service, and "that a certain promissory note which he," the defendant, "then and there produced and delivered to" *W.*, "purporting to be made for the payment of the sum of 21*l.*" (not saying by whom it purported to be drawn, nor otherwise describing it), was a good and valuable security for 21*l.* : by which false pretences he obtained &c. Whereas defendant was not a captain in the *Company's* service, and whereas the said promissory note which he then and there produced and delivered to *W.* "was not a good and valuable security for the sum of 21*l.*, or for any other sum." Verdict, Guilty.

ERROR on a judgment of the Central Criminal Court. The defendant was convicted and received judgment on an indictment, the material parts of which are as follows.

"The jurors" &c., "That *Edward Wickham*, late of" &c., "being an evil-disposed person, and contriving and intending to cheat and defraud one *William Walker* of his monies, on" &c., "with force and arms at" &c., "unlawfully did falsely pretend to the said *William Walker* that he, the said *E. W.*, was a captain in the service of the *East India Company*, and that a certain promissory note which he the said *E. W.* then and there produced and delivered to the said *William Walker*, purporting to be made for the payment of the sum of 21*l.*, was a good and valuable security for the sum of 21*l.*, by means of which said false pretences the said *E. W.* did then and there unlawfully, knowingly and designedly, fraudulently obtain of and from the said *William Walker* eight pieces of the current gold coin of this realm called sovereigns" &c. "of the monies of the said *William Walker*, with intent to cheat and defraud him thereof: whereas the said *E. W.* was not a captain in the service of the *East India Company*,

Held, on writ of error, that the indictment did not sufficiently describe the note, or shew how it was wanting in value; and that a conviction could not be supported on the representation as to the defendant's character, because the false pretences were so connected on the record, that one could not be separated from the other.

Judgment for the crown reversed.

and

and whereas the said promissory note which he the said *E. W.* then and there produced and delivered to the said *William Walker* was not a good and valuable security for the sum of 21*l.*, or for any other sum of money whatsoever, against the form of the statute" &c., "and against the peace" &c.

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The errors specially assigned were, that, in the indictment, the alleged misdemeanors are uncertainly and too generally alleged: that no false token is specified: that the defendant is not alleged to have known that the promissory note was not a valuable security for 21*l.* or any other sum; that the indictment charges as misdemeanors acts and statements not in themselves misdemeanors or indictable offences; and that the judgment is contrary to law, and not to be pronounced or set for or upon such matters as in the indictment are supposed.

Price for the defendant. The indictment is bad, because the alleged means of deception consist in the defendant's bare assertion. It is not shewn that he supported that assertion by reference to any token, or to any other extrinsic source of credit. The late act, 7 & 8 G. 4. c. 27., has repealed stat. 33 H. 8. c. 1., which punished the obtaining of money or goods by false tokens or letters; but in construing the act now in force, stat. 7 & 8 G. 4. c. 29. s. 53., the statute in *pari materiâ* of 33 H. 8. may reasonably be looked to, as it was in cases under stat. 30 G. 2. c. 24. s. 1.: *Rex v. Mason (a)*, *Young v. The King (b)*. The object of the present act, though its words are large ("any false pretence") was not to

(a) 2 T. R. 581.

(b) 3 T. R. 98.

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introduce a new law as to the nature of the offence, but to obviate difficulties arising in practice from the subtle distinction between larceny and fraud. Now the statute of *H. 8.* specifies, as the means of deception, "privy tokens, and counterfeit letters in other men's names." In both those instances something more than the credit of the defendant himself was held out; the name or sanction of a third person was introduced. At common law, the understanding as to this offence was similar. The Latin word "*prætensum*" shews that the party deceiving was supposed to use some thing or person as the medium of deception. And this agrees with the opinion which has always prevailed, that the fraud, to constitute an indictable offence, must be such an artful device as will impose upon a man of ordinary caution. [Lord Denman C. J. I never could see why that should be. Suppose a man has just art enough to impose upon a very simple person, and defraud him, how is it to be determined whether the degree of fraud is such as shall amount to a misdemeanor? Who is to give the measure?] The law prescribes it. Lord Kenyon, in *Young v. The King* (*a*) admits that such a question may arise, observing, "It seems difficult to draw the line, and to say to what cases this statute shall extend; and therefore we must see whether each particular case, as it arises, comes within it." Passing what is termed a "flash note," would not be a false pretence. In *Regina v. Jones* (*b*), where the defendant was indicted for having obtained money by pretending to be sent for 20*l.* for the use of *J. S.*, Holt C. J. said, "It is no crime unless he came with false tokens. Shall we indict a man for

(a) 3 T. R. 98.

(b) 2 *Ld. Ray.* 1013.

making

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against
WICKHAM.

on his banker: but that was only adding another lie.” [Lord *Denman* C. J. How many lies are necessary to make a false pretence?] Something ought to be produced to second the false representation; and accordingly *Lawrence* J. says in *Rex v. Lara* (a), “It is admitted that a mere false assertion unaccompanied by a recommendation is not indictable, and I think there is nothing in this case beyond the defendant’s own false assertion.” There must, therefore, to support such an indictment, be either a conspiracy, or else some false token, or use made of a third person’s credit, to second the false pretence. And *Rex v. Wheatly* (b) shews that this is the law, in the case of frauds upon individuals. [Coleridge J. In *Rex v. Barnard* (c) the defendant was indicted for obtaining goods by pretending that he was an under-graduate of *Oxford*; evidence was given that he went to the prosecutor’s shop wearing a commoner’s cap and gown; and *Bolland* B. held that this alone would have been proof from which a jury might infer the pretending to be a member of the University; and that such pretence would satisfy the statute: he referred also to cases “in which offering in payment the notes of a bank which has failed, knowing them to be so, has been held to be a false pretence, without any words being used.” Suppose, in the present case, the defendant had not stated that he was an officer, but merely appeared in uniform.] Perhaps that might have made some difference. But at all events, if persons trust to a simple assertion, they cannot indict, but must be left to a civil remedy. As to a check or note, in giving

(a) 6 T. R. 565.

(b) 2 Burr. 1125.

(c) 7 Car. & P. 784.

those

those a third person is brought on the scene; but where a promissory note is given, if it be the party's own, he adds nothing to his other representations, but his own undertaking to pay. He merely obtains a loan. So in *Rex v. Codrington* (a) where the defendant sold a reversionary interest, representing that he was entitled to it, and executed an assignment with a covenant for title, *Littledale J.* held that no indictment for false pretences lay. The alleged fraud here rests in mere assertion. [Lord *Denman C. J.* Where the defendant names a third person, the pretence still rests only in his assertion. *Coleridge J.* mentioned *Rex v. Airey* (b)]. That was a fraud committed by a common carrier, and might turn on circumstances peculiar to such a case. *Rex v. Villeneuve* (c), which is cited by *Buller J.* in *Young v. The King* (d) (but not separately reported), may be relied upon for the Crown; but there a third person, known by name to the prosecutor, was introduced; and the soundness of the decision may be doubted.

But, further, the allegations respecting the note are too loose. It has been usual, where the alleged false pretence has consisted in delivering a note which proved useless, to state the purport of the note, and then to shew by evidence that a note of that purport was unavailable; and if the evidence in this respect has fallen short, the indictment has failed; *Rex v. Flint* (e), *Rex v. Spencer* (g). Here no description of the note is given: the record does not shew who was the maker, nor when the note was payable. Something should have been stated, at least to identify it; and the indictment ought

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The QUEEN
against
WICKHAM.

(a) 1 Car. & P. 661.

(c) 3 T. R. 104,

(e) Russ. & Ry. 460.

(b) 2 East, 30.

(d) 3 T. R. 98.

(g) 3 Car. & P. 420.

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against
WICKHAM.

to have shewn how the note proved not to be a valuable security. It may have been a forgery, or invalid for want of a stamp. And the record ought to shew that the defendant knew the instrument to be worthless. It may have been a note drawn by himself, and then, so far as it was a token, it was a true one. At any rate the false token or pretence must, on an indictment, be fully stated, and specially negatived; *Rex v. Munoz (a)*, *Rex v. Perrott (b)*: as *Bayley J.* says in the latter case, "the whole assertion which induces the party to part with his money must be stated." [*The Court* called upon *Sir F. Pollock*, for the Crown, to answer these latter objections.]

Sir F. Pollock, contra. The defendant's knowledge is certainly not alleged, except by the words "falsely" and "fraudulently," which are not sufficient: and the note is not set out so as to identify it. But the false pretence of being a Captain in the *East India Company's* service is properly stated and negatived, and bears out the conviction. [*Lord Denman C. J.* One pretence might have been unavailing without the other.] The words of the indictment are, "by means of which said false pretences the said *Edward Wickham* did then and there unlawfully" &c. "obtain." Now the crime, as charged, being made up of two false pretences, it must be presumed that a Judge would tell the jury that one of them was so laid as not to call for an answer. [*Lord Denman C. J.* Can we presume that on a writ of error? On a special verdict it might have been stated that the jury convicted as to one pretence, but nega-

(a) 2 *Str.* 1127.(b) 2 *M. & S.* 379.

tived

1839.

Friday,
April 26th.

WENTWORTH and Another *against* Cock, Administrator of S. Cock.

Plaintiffs entered into an agreement with C. to supply him with a certain quantity of slate immediately; with a certain other quantity monthly, at a fixed price; and with any further quantity, monthly, that C. might require. C. engaged to receive the slate, not exceeding 200 tons per month; and the agreement was to be in force till 1st January, 1838. Held, that plaintiffs might sue the administrator of C. for refusing to receive slate sent, in pursuance of the contract, after C.'s death and before the 1st January, 1838.

ACTION of assumpsit commenced 16th *June* 1837.

The declaration stated an agreement in *October* 1836 between plaintiffs and intestate, that plaintiffs should supply to intestate a certain quantity of slate block monthly, to be delivered in *London* at a specified price; that they should also supply to him, immediately, from 100 to 130 tons of blocks at the same price but of different dimensions, and any further quantity, monthly, that the intestate might require. The intestate engaged to receive any quantity of the above-mentioned blocks not exceeding 200 tons per month. The plaintiffs, during their contract with the intestate, were not to supply any other person with blocks of the same description, except for use in the plaintiffs' neighbourhood; and the contract was to be in force till 1st *January* 1838 unless cancelled by mutual consent: the terms of payment to be by bill at four months, and discount for ready money. The declaration averred mutual promises, and the readiness of plaintiffs to supply the intestate during his life, and the defendant, administrator as aforesaid, since intestate's death, with blocks of the description and at the price agreed upon; and that plaintiffs, after the decease of intestate, had sent to *London* divers tons of such blocks in pursuance of the agreement, and were ready and offered to deliver them to defendant as in the agreement mentioned, and were ready and willing to prepare

pare and deliver the residue; but that defendant did not nor would accept the slate blocks so sent to *London* and offered to him, or any part thereof, nor pay to plaintiffs the price thereof, though often requested; whereby plaintiffs lost the benefit of the agreement. Plea, that after making the agreement and promise, and before any breach thereof, by the intestate, he died. Verification.

Demurrer and joinder.

Warren, for the plaintiffs. The question is, whether this is a personal contract which expired with the intestate, or one which is obligatory on his representatives. There is a distinction in this respect between acts which do, and acts which do not, require the personal skill of the party in order to execute them. It is only in the former class of cases that the contract is held to be extinguished by the death of the contracting party. There are cases in which contracts even of a personal nature have been adjudged to be obligatory on the executor. Thus an action lies against an executor on an obligation or covenant to instruct an apprentice in his trade, "though it sounds as a personal act;" *Com. Dig., Administration* (B14.), referring to *Walker v. Hull* (a), where it was said by the Court, on a motion to arrest judgment, that the master's covenant obliged his executors also, "and they ought to see the apprentice taught his trade, and if they are not of the same trade, they ought to assign him to another who is of the trade, so that he may be taught according to the covenant." This is a far stronger

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against
Cock.

(a) 1 *Lev.* 177.

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case than the present. The same principle, viz., that an executor is liable on his testator's promise, not only to pay a debt certain, but also to do a collateral act which is uncertain, and rests only in damages, is laid down in *Com. Dig.* (under the head just cited); *Sanders v. Esterby* (a), *Berisford v. Woodroff* (b), and in *Shepard's Touchstone*, 482. In *Hyde v. The Dean and Canons of Windsor* (c) it is said "a covenant lies against an executor in every case, although he be not named: unless it be such a covenant as is to be performed by the person of the testator, which they cannot perform." In all these cases, the executor is liable though not named; *Hambly v. Trott* (d), *Hyde v. Skinner* (e). A building contract survives the death of the parties; per *Coke C. J.* in *Quick v. Ludborrow* (g). The distinction between the contracts of the testator which are extinguished by his death, and those which are not, is well put in *Pothier on Obligations* (h), part 3. ch. 7. art. 3. "Il y a aussi quelques dettes qui s'éteignent par la mort du débiteur. Telles sont celles qui ont pour objet quelque fait personnel au débiteur. . . . Hors le cas des faits personnels, celui qui a promis de faire quelque chose, et qui est mort sans l'avoir fait, quoiqu'il n'ait pas été mis en demeure de le faire, transmet son obligation à ses héritiers, qui sont obligés de faire ce que le défunt s'étoit obligé de faire." The same principle is adopted by *Cod. Justinian. Lib. 8., tit. 37. De contrahendâ et committendâ stipulatione*; s. 15. "Si

(a) *Cro. Jac.* 417.

(b) *Cro. Jac.* 404. *S. C.*, as *Berisford v. Goodrouse*, 1 *Roll. Rep.* 433. (more fully).

(c) *Cro. Elix.* 552.

(d) *Cowp.* 371.

(e) 2 *P. Will.* 197.

(g) 3 *Bulstr.* 30.

(h) *Traité, &c. de Droit Civil*, tom. i. p. 343. ed. 2. 4to.

quis

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against
COCKE.

build a lighthouse was held to be personal; but that was on the ground of its being a matter of personal skill and science.]

LORD DENMAN C. J. There is nothing in the defence. The contract leaves no option to the intestate of refusing to take the slate delivered monthly in certain quantities and at fixed prices, or the quantity to be delivered immediately. As to the further quantity to be delivered if required, the defendant will probably not now require it. This is the only part of the contract on which the intestate could have exercised any choice. It is like any ordinary case of goods ordered by a testator, which the executor must receive and pay for.

LITLEDALE J. No doubt the personal representatives are bound, although not named; and they are bound to pay damages out of the assets, if they do not take the contract upon themselves.

PATTESON J. concurred.

COLERIDGE J. If the contract had been merely to supply what the intestate might require, a different question would have arisen.

Judgment for the plaintiffs.

1839. such protection without resorting to her husband. The jury found a verdict for the plaintiff.

TURNER
against
ROOKER.

Crowder, on a former day of the term (a), moved for a new trial on the ground of misdirection. Assuming that articles of the peace were necessary for the wife's protection, it ought to have been shewn that the separation between these parties had resulted from the husband's misconduct, or had taken place under such other circumstances as would legally authorise her to contract debts with which he should be chargeable. *Mainwaring v. Leslie* (b) and *Hindley v. The Marquis of Westmeath* (c) shew the rule on this subject where the wife has become indebted for goods, and this case falls within the same principle. The jury's attention was not called to the necessity of proof respecting the circumstances of the separation. And the learned Judge left a question of law to them, in asking them whether the wife had reasonable ground for exhibiting articles of the peace. And further, in putting the question, whether she had means of obtaining protection without resorting to her husband, he should have pointed out to the jury that she had a maintenance allowed, and should at least have given them some rule by which to decide whether it was or was not sufficient for such a purpose as this. [Lord Denman C. J. I do not see that the separate maintenance has any thing to do with the question. She has that for other purposes: this cannot have been contemplated in making the allowance. The defendant

(a) April 19th. Before Lord Denman C. J., Littleale, Patteson, and Coleridge Js.

(b) *M. & M.* 18.

(c) 6 *B. & C.* 200.

was bound to protect her, I should think, though they were living apart. *Littledale J.* I think so too.]

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TURNER
against
ROOKES.

The Court took time to confer with *Maule B.*

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. On referring to the notes of the evidence, there appears sufficient to shew that the wife was in personal danger which warranted her exhibiting articles of the peace. Then the question is, whether the defendant was liable for the costs, it appearing that he allowed his wife a separate maintenance. There was some discussion as to the sufficiency of the allowance, but we need not go into that. The defendant was proved to have himself committed violence against his wife, and he cannot avail himself of the maintenance to exempt him from the charges incurred by his own violent conduct. There will therefore be no rule.

Rule refused (a).

(a) See *Grindell v. Godmond*, 5 A. & E. 755.

1839.

Friday,
April 26th.

MATTOCK, Executor of SOUTHWOOD, against
KINGLAKE.

By articles under seal, *A.* agreed to sell and *B.* to purchase certain premises. *B.* therein covenanted to pay, on or before a fixed day, as the consideration of such sale and purchase, a certain sum, with interest to the time of the completion of the purchase, *A.* allowing thereout the same rate of interest for so much of the money as might be paid in the meanwhile; and *B.* agreed to pay for the conveyance and the stamp.

Held, that the conveyance was not a condition precedent to, or concurrent with, the payment, and that *A.* might therefore sue for the purchase-money and interest, without tendering a conveyance.

DEBT by the plaintiff as executor of one *Southwood*.

The declaration stated that defendant was seised in fee of certain premises by virtue of a bargain and sale enrolled, dated 19th *February* 1822, by which the Bishop of *Winchester* had bargained and sold the same to *Southwood* in fee to such uses as he (*Southwood*) by deed or instrument in writing, with or without power of revocation and new appointment, sealed and delivered by him in the presence of, and attested by, one or more credible witness, should from time to time, or at any time, appoint of and concerning the same; and in default of such appointment to the use of defendant in fee, in trust for *Southwood*, his heirs and assigns for ever. That, defendant being so seised, it was afterwards agreed by and between *Southwood* and defendant, at defendant's request, that *Southwood* should convey to defendant all his estate and interest in the premises; that thereupon by articles of agreement, sealed and delivered by *Southwood* in the presence of a credible witness, and made between *Southwood* and defendant, *Southwood* agreed to sell and defendant to purchase the said premises for the sum thereafter mentioned; and defendant thereby, for himself and his heirs, covenanted with *Southwood*, his heirs and assigns, to pay to him or them, on or before 19th *February* 1825, as the consideration for such sale and purchase, the sum of 11,206*l.*, with interest at 5 per cent., payable half yearly, to the time of the completion of the purchase, *Southwood* allowing thereout the

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 against
 KINGLAKE.

silent as to the expence; 1 *Sugd. Vendors* &c. ch. 4. sec. 4. (a), where the authorities are collected. In *Price v. Williams* (b), a lessee, suing the party who had contracted to let, and who was to pay for the lease, was held not bound to aver a tender. Indeed, it is not clear that the vendor can recover the costs of the conveyance, if he incurs them without the direction of the vendee. At all events, the tender of a conveyance is not a condition precedent, where a time is fixed for payment of the purchase-money, and none for making the conveyance. *Pordage v. Cole* (c) is directly in point, and is not distinguishable from the present case. The rules for ascertaining the dependence or independence of covenants in a contract are all to be found in the note (4.) (d) of Mr. Serjt. *Williams* on that case. The fact, that the defendant is admitted on the record to be already seised in fee of the legal estate, is alone enough to obviate the necessity of a tender; or, indeed, of any conveyance at all. The articles of agreement, executed in the manner set forth, operated as an execution of the power reserved to *Southwood*; so that the whole estate and interest, legal and equitable, was already in the defendant.

Manning, contra. Although it is alleged in the declaration that the defendant was seised in fee in trust for *Southwood*, yet the declaration also sets out the conveyance under which the defendant is supposed to have become seised, and that conveyance is an indenture of bargain and sale, by which the premises were conveyed to *Southwood* and his heirs, to uses to be thereafter

(a) § 55, et seq. P. 374 &c. 10th ed.

(b) 1 *M. & W.* 6.(c) 1 *Saund.* 319.(d) 1 *Wms. Saund.* 320.

appointed.

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against
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unexceptionable title. As to the argument drawn from the fixed day of payment, it is not denied that parties may contract for a conveyance to be executed on one day, and the purchase-money paid on a precedent day; but the courts will not put such an interpretation upon a contract, unless the intention is plain. In *Pordage v. Cole (a)*; the words "the money to be paid before *Midsummer*, 1668," stand unconnected with any mention of conveyance or consideration. Here several expressions indicate an intention to make the conveyance and the payment concurrent and mutually dependent acts. The 11,206*l.*, or the balance, is to be paid on the 19th *February* 1825, "as the consideration of such sale." Now, though the words "shall give" "775*l.* for all his lands" occur in *Pordage v. Cole (a)*, yet the words relied upon in that case (*viz.* "the money to be paid before *Midsummer*, 1668"), as making the engagement to pay unconditional, occur in a different part of the deed. Again, interest is to be paid with the principal "to the time of the completion of the purchase." Now the purchase (which means the acquisition of the land by the vendee), cannot be said to be complete until the land is conveyed. Unless, therefore, the two acts were intended to be concurrent, the purchase-money might be paid in *February* 1823; and if, by death or incapacity of parties, the conveyance was delayed till 1833, the defendant might be called upon for ten years' interest on money which he had paid, and of which *Southwood* was, in respect of the same period, receiving interest from other sources. The circumstance of the provision for payment of the expenses of conveyance being coupled with stipulation for paying the money and

(a) 1 *Saund.* 319.

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completing the purchase, is a further proof that the conveyance and payment of the purchase-money were to be contemporary. A bill in equity for a specific performance lies as well for vendor as vendee; *Gibson v. Patterson* (a), *Baxter v. Lewis* (b); yet such a bill would be absurd if the vendor might, at law, recover the amount of the purchase-money, although he had not conveyed, for the jurisdiction of equity proceeds on the ground that the plaintiff has no adequate remedy at law. If a vendee fail to pay the purchase-money on the stipulated day, the vendor may file a bill for a specific performance, or he may sue at law for the damage which he has sustained by reason of the breach of covenant, or of promise, on the part of the vendee; but if he choose to sue at law in a form of action in which he seeks to recover the price of the property sold, he must actually execute a conveyance, and tender it to the vendee; *Standley v. Hemmington* (c), *Heard v. Wadham* (d), *Goodisson v. Nunn* (e), *Glazebrook v. Woodrow* (g), *Pincke v. Curteis* (h).

Lord DENMAN C. J. None of the circumstances relied upon by Mr. Manning are sufficient to shew that the acts of payment and conveyance here were to be concurrent, or to distinguish this case from *Pordage v. Cole* (i) and the authorities cited in the note to it. If, as is contended on the part of the plaintiff, the legal and equitable estates are now united in the defendant, he requires no remedy against the plaintiff which he has not already in his own hands. If not, we cannot

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(a) 1 *Atk.* 12.(c) 6 *Taunt.* 561.(e) 4 *T. R.* 761.(h) 4 *Bro. C. C.* 332.(b) *Forrest*, 61.(d) 1 *East*, 619.(g) 8 *T. R.* 366.(i) 1 *Saund.* 319.

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help him to a remedy which he has not secured for himself by his contract.

LITLEDAL J. A time being fixed for payment, and none for doing that which was the consideration for the payment, an action lies for the purchase-money without averring performance of the consideration. An action for not executing a conveyance of the premises might have been maintained by the defendant before the day of payment; and in such action no allegation of payment would have been necessary. The covenants are independent, and each party has relied upon his remedy by action against the other. The case, therefore, differs from *Callonel v. Briggs* (a), and from *Goodisson v. Nunn* (b), *Glazebrook v. Woodrow* (c), and other cases cited, where both acts were to be done at the same time, or on the same day.

PATTESON J. *Pordage v. Cole* (d) is directly in point. We must over-rule it if we decide in favour of the defendant. There is no express provision that the conveyance shall be executed before payment, nor any reasonable intendment that it was to be necessarily precedent to, or concurrent with, it. The words "completion of the purchase," which furnish the only plausible argument in the defendant's favour, only mean payment of the rest of the purchase-money. On the day specified, the defendant was to pay all the principal sum that remained due with interest up to that time; but he might have prevented the further running of interest by payment at any time before that day, if he pleased.

(a) 1 *Salk.* 112.(c) 8 *T. R.* 366.(b) 4 *T. R.* 761.(d) 1 *Saund.* 319.

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at 16s. 6d. a quarter, free on board, to be delivered on the 20th to the 22d then instant; payment by acceptance three months from delivery; that afterwards, and before the said 22d day of *May*, to wit 17th *May*, plaintiff, at the special instance &c., gave time to defendants for the delivery of the said sloop-load of ground bones until the 24th day of the said month of *May*; and, although plaintiff hath always, from the time of the making the said contract hitherto, been ready and willing to accept and receive from defendants the said sloop-load &c., and to pay for the same at the rate or price and in manner aforesaid, whereof defendants, during all the time aforesaid, had notice, and were, to wit on 24th *May*, requested by and on behalf of plaintiff to deliver to him the said sloop-load of ground bones, yet defendants, not regarding their said contract, but contriving &c., did not nor would, upon the said 24th day of *May*, or at any time or times whatsoever, deliver to plaintiff the said sloop-load &c., or any part thereof, but wholly refused &c.: whereby plaintiff hath wholly lost and been deprived of the advantage which he would have derived from the performance of the said contract, and hath lost and been deprived of profits which might, and otherwise would, have accrued to him from the delivery of the said sloop-load of ground bones, the price thereof having greatly risen, (to wit) to the extent of 1l. 4s. 6d. per quarter, between the making of the said agreement and the refusal of defendants to fulfil the same as aforesaid.

Pleas. 1. Non Assumpsit. Issue thereon.

2. That plaintiff did not, at the special instance &c., give time &c., in manner and form &c.: conclusion to the country. Issue thereon.

3. That

3. That defendants had no notice that plaintiff was ready and willing to accept &c., in manner and form &c.: conclusion to the country. Issue thereon.

4. That the said giving of time for the delivery of the said sloop-load of ground bones, in the declaration mentioned, formed and was part and parcel of a contract between plaintiff and defendants for the sale of certain goods, (to wit) ground bones, for the price of upwards of 10*l.* sterling, by defendants to plaintiff, and that plaintiff did not accept any part of the said goods so sold and actually receive the same, nor did plaintiff give any thing in earnest to bind the said bargain or in part of payment, and that no note or memorandum in writing of the said bargain was made and signed by defendants or either of them, or their agent or agents thereunto lawfully authorised: verification. Replication, that the said giving of time &c. was not part of the contract between plaintiff and defendants for the sale of the said ground bones: conclusion to the country. Issue thereon.

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On the trial before *Alderson B.*, at the *York Spring Assizes*, 1837, the plaintiff put in the following written note, signed, on the day of the date, by the broker acting for the plaintiff.

“*Hull*, 10th May, 1836.

“Bought of Messrs. *Dawber* and *Stephenson*, for Mr. *William Stead*, of *Borobridge*, a sloop-load of about 400 quarters of ground bones of good merchantable quality, at 16*s.* 6*d.* a quarter, free on board, to be delivered on the 20th to the 22d instant. Payment by acceptance at three months from delivery.

“*Joseph Dawson*, Broker.”

It

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It further appeared that on the 17th of *May Dawson* told the defendant *Stephenson* that the 22d would fall on a *Sunday*, and asked him if he could deliver the bones on the 21st; to which *Stephenson* answered, "You had better say *Monday* or *Tuesday*;" and *Dawson* replied, "*Monday* or *Tuesday*." The bones were not sent: the price was afterwards tendered, and refused by the defendants. The price of bones had risen to 21s. per quarter on the 24th *May*. *Dawson* stated in evidence that the time for the delivery of the bills would be enlarged to 24th *May*, by the time for delivering the goods being enlarged to that day.

The defendants' counsel contended that, the written contract having been varied by a verbal agreement, there was no complete written contract, under sect. 17 of the Statute of Frauds, upon which the plaintiff could recover: but the learned Judge, being of opinion that the effect of the enlargement of the time was, not to alter the contract, but only to dispense with its performance on the day first named, directed a verdict for the plaintiff, giving leave to move to enter a verdict for the defendants on the issues upon the first and fourth pleas. In *Hilary* term, 1837, *Alexander* obtained a rule accordingly (a). In last *Hilary* term (b),

Cresswell and *Martin* shewed cause. The alteration as to the time of delivery formed no part of the contract as it was originally framed, nor did it vary that contract: it was merely a dispensation from performing part of its terms, which prevented the plaintiff from availing

(a) The rule was also for the reduction of damages, on grounds which became immaterial by the decision of the Court.

(b) January 21st, 1839. Before Lord Denman C. J., *Littledale*, *Williams*, and *Coleridge* Js.

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fendant to deliver by the 22d, and the plaintiff to give an acceptance at three months from the delivery: then it shews a substitution of a new day of delivery, and necessarily of a new time for the delivery of the acceptance, and for its maturity. That is a material variation of the contract; and it takes place on a fresh consideration. In the case of sales of real property, under sect. 4 of the statute, time, at law, is of the essence of the contract; and it is so in equity where the value of the thing sold may depend upon the time of performance, as here; 1 *Sugd. Vend. and Purch.* 402. (10th ed.), *Wilde v. Fort* (a), *Doloret v. Rothschild* (b), *Rothschild v. Hennings* (c). [*Littledale J.* referred to *Shepherd v. Johnson* (d)]. *Cuff v. Penn* (e) can hardly be considered an authority now; and there a partial delivery, on a day later than that named in the contract, had been made and accepted; and Lord *Ellenborough* lays a stress on that fact. There, too, the action was for not accepting, and the difficulty did not exist which arises here from the difference of value at different times. In *Thresh v. Rake* (g) the agreement did not require a writing under the statute of frauds; and the Court, in *Goss v. Lord Nugent* (h), distinguish, as to the effect of varying a written contract, between written contracts which might have been enforced if only verbal, and those under the Statute of Frauds. *Warren v. Stagg* (i), perhaps, is in favour of the plaintiff; but that case is inconsistent with later authorities. The cases under sect. 4 of the Statute of Frauds apply in

(a) 4 *Taunt.* 334. (b) 1 *Sim. & St.* 590.

(c) 9 *B. & C.* 470.; reversing the judgment of C. P. in *Hennings v. Rothschild*, 4 *Bing.* 315.

(d) 2 *East*, 211. See *Green v. Bicknell*, 8 *A. & E.* 701.

(e) 1 *M. & S.* 21. (g) 1 *Esp.* 53.

(h) 5 *B. & Ad.* 58. (i) Cited in *Littler v. Holland*, 3 *T. R.* 591.

principle

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question at the trial, and before us, was, whether this enlargement of the time was an alteration of the contract, or only a dispensation with its performance as to time. The declaration, after setting out the original contract, stated that the plaintiff, at the special instance of the defendants, gave them time for the delivery to the 24th *May*, and averred a demand on the 24th. The fourth plea alleged that this giving time was parcel of a contract within the Statute of Frauds; that there was no acceptance wholly or in part, or any earnest, or part payment; and that there was no note or memorandum in writing of it: and the replication traversed its being parcel of the contract.

The principles on which this case must be decided are clear and admitted. The contract is a contract within the Statute of Frauds, and cannot be proved, as to any essential parcel of it, by merely oral testimony: for to allow such a contract to be proved partly by writing and partly by oral testimony would let in all the mischiefs which it was the object of the statute to exclude. Many cases were cited in the argument on both sides, the plaintiff's counsel relying chiefly on *Cuff v. Penn* (a), the defendants on *Goss v. Lord Nugent* (b), the decision in which it is certainly not easy to reconcile with that in the former. But it seems to us that we are mainly called on to decide a question of fact; what, namely, was the intention of the parties in the arrangement come to for substituting the 24th for the 22d as the day of delivery; did they intend to substitute a new contract for the old one, the same in all other respects except those of the day of delivery and date of

(a) 1 *M. & S.* 21.(b) 5 *B. & Ad.* 58.

the accepted bill, with the old one? Where the variation is so slight as in the present case, and the consequences so serious, the mind comes reluctantly to this conclusion; and this reluctance is increased by considering in how many instances of written contracts within the Statute of Frauds slight variations are made at the request of one or other of the parties, without the least idea, at the time, of defeating the legal remedy or the original contract. But the same principle must be applied to the variation of a day and a week or a month; and it seems impossible to suppose that, when the plaintiff had agreed to substitute the 24th for the 22d, either party imagined that an action could be brought for a non-delivery on the 22d, or that a delivery on the 24th would not be a legal performance of the contract existing between them.

It was urged by the plaintiff's counsel that the defendant's argument reduced him to an inconsistency; that he alleged, on the one hand, an alteration of the contract by parol, and yet, on the other, asserted that such alteration by parol could not be made. But this is, in truth, to confound the contract with the remedy upon it. Independently of the statute, there is nothing to prevent the total waiver, or the partial alteration, of a written contract not under seal by parol agreement; and, in contemplation of law, such a contract so altered subsists between these parties: but the statute intervenes, and, in the case of such a contract, takes away the remedy by action. It cannot be said that the time of delivery was not originally of the essence of this contract: the evidence shews that the value of the article was fluctuating; and the time of payment was to be calculated from the time of delivery. Where these circumstances exist, it

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1839. cannot in strict reasoning be argued, as was said by Lord *Ellenborough* in the case of *Cuff v. Penn* (a), that the contract remained, although there was an agreed substitution of other days than those originally specified for its performance. Nor does any difficulty arise from the want of consideration for the plaintiff's agreement to consent to the change of days; for the same consideration which existed for the old agreement is imported into the new agreement which is substituted for it.

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Putting, therefore, that construction on what passed between these parties which best effectuates their intention, and giving also full effect, as we ought, to the salutary provisions of the Statute of Frauds, we think that this giving of time was parcel of the contract, and, consequently, that the verdict on the fourth plea should be entered for the defendants.

Rule absolute accordingly (b)

(a) 1 M. & S. 21.

(b) See *Marshall v. Lynn*, 6 M. & W. 109.

Monday,
April 29th.

The QUEEN *against* The Mayor of BRIDGNORTH.

Payment of rates, to entitle a person to be put on the burgess list of a borough, under stat. 5 & 6 W. 4. c. 76. s. 9., must be a payment by the party's own act. It is not sufficient that another person, without his authority, pays the rates for him.

A RULE nisi was obtained, in *Michaelmas* term 1837, for a mandamus to the mayor of *Bridgnorth* to insert the several names of *Job Allen* and seventy-seven other persons named by the rule, in the burgess roll of the said borough. The names of these parties had

Where a party, required by law to pronounce a decision on certain points, is brought before the Court by a motion impugning such decision, the general rule is, that he shall have costs if the application fails.

Per *Littledale J.* It is not regular to grant a single rule nisi for the issuing of several writs of mandamus.

been

been inserted by the overseers in their lists made in *September* 1837, but on the revision, in *October*, before the mayor and assessors, it was objected "that none of the said several parties had paid their respective rates themselves, but that the same had been paid for them by third parties." It was contended in answer, that, the rates having been paid, it was immaterial by whom or in what way the payment was made. The mayor and assessors held it necessary that all rates should be paid directly by the parties themselves, and therefore they expunged all the names. *William Gittos*, described as a law stationer, and stating himself to be an inhabitant householder and burgess of *Bridgnorth*, deposed, in support of the rule, that he did, on 31st *August* 1837, pay to the overseers of the proper parishes respectively, all such rates as had become payable by the parties claiming enrolment, for the premises in respect of which they claimed, during 1837 and the two preceding years, except for the last six calendar months. And in a supplemental affidavit he stated that the rates "were all paid by him by the authority and with the knowledge and approbation of such several parties respectively."

The affidavits in opposition to the rule (which were numerous and went into much detail) stated that the rates had been paid, on the evening of *August* 31st, by persons who belonged to a political party in the borough, and, as was believed, for political purposes; that the payments had been made to the overseers of the respective parishes, in gross sums covering the amounts due from the parties named in certain lists, and whose claims were now in question; and that the overseers gave receipts for the gross sums to the parties paying, but none to the persons in whose names the payments

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were made. The affidavits contained very full statements as to the condition in life of these parties, from which, and from their having been unable to pay rates when called upon during the three years in question, as well as from other circumstances, it was inferred that they would not and could not have paid the rates for themselves. Three of the parties deposed that they had not authorized such payments, and did not know of them till after they were made; and others were stated to have made admissions to the same effect.

R. V. Richards now shewed cause, and contended that the parties claiming enrolment had not, under these circumstances, "paid" their rates, within the meaning of stat. 5 & 6 W. 4. c. 76. s. 9.

Jervis, contra, was called upon by the Court. [Lord Denman C. J. We will not enquire into all the titles (a) on this rule.] The general question on which they depend is, whether a party is entitled to be put upon the burgess-roll when another person has paid his rates for him. *Rex v. Lower Heyford* (b) has some bearing on this point. [Lord Denman C. J. No: there it was considered by the Court that the rates were, in fact, paid by the party himself. The question here is, whether a voter can be put upon the list, without his knowledge, by another person.] The words of the act are, "unless he shall have paid" "all such rates." The payment on his account is his payment. If the statute had meant that this should not suffice,

(a) See *Reg. v. The Mayor of Hurwich*, 8 A. & E. 919. Stat. 7 W. 4. and 1 Vict. c. 78. s. 24.

(b) 1 B. & Ad. 75.

words expressive of such intention would have been used. It may be said that such payments tend to bribery; but if that offence is committed, there is a remedy. [*Coleridge J.* Persons are applied to for their rates, and do not pay; then some one comes, and in one evening pays the rates of all in a gross sum, without their knowledge.] That statement applies only to some of the cases. [*Lord Denman C. J.* Putting the most general case: 'if a man pays another's rates without authority from him, and as a volunteer, is that a payment by the party rated?'] Construing terms strictly, the party does not *pay*; but the act does not require a payment with his own hand. [*Coleridge J.* Why need those words be used, when the act says "he shall have paid?"] The party does pay if he adopts the payment.

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LORD DENMAN C. J. We ought to promulgate our opinion on this subject without delay. If the practice described were to prevail, there would be great danger of the most enormous bribery. The statute, in requiring that the rates shall have been paid, contemplates some payment by the party's own act. The rule must be discharged.

LITLEDALE, PATTESON, and COLERIDGE, Js., concurred.

R. V. Richards then applied for costs, and urged the expence which had been caused by including seventy-eight cases in one application.

Jervis, contra. The point was new, and the want of authority, on which this Court has proceeded, was not the precise ground on which the mayor rejected the

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names. No real disadvantage resulted from including all the cases in one rule.

LORD DENMAN C. J. I say nothing as to the number of cases included in one rule. If the attention of the Court had been directed to the facts when the rule was moved for, probably it would not have been granted in that form. And if an application in each particular case was necessary, it would have been no better for the parties shewing cause. But where a person is bound by law to pronounce a decision, and that decision is disputed before us, and proves to be right, he is entitled to costs. That should be the general rule, though I do not say that circumstances may not take a case out of it. This rule must be discharged with costs.

LITLEDALE J. The practice of moving for one or more writs of mandamus to be granted by the same rule should not be drawn into a precedent. It appears by a note in the possession of Mr. *Robinson*, that an application was made in 1793 for a rule to be so framed, but this Court said that they never heard of a rule to shew cause why one mandamus or more should not issue (a).

(a) The reporters have been favoured with the note referred to, which is as follows: —

Mr. *Perceval* moved for and obtained a rule nisi for a mandamus to *Samuel Hughes* to take upon himself the office of one of the forty-eight men of *Northampton*, which was granted.

He then said there were four other persons in the same situation, and although he understood the Court last term to have decided that one mandamus could not comprise more than one person, yet he hoped the Court would permit these five men to be included in one rule nisi.

But the Court said, they sometimes granted a rule to shew cause why one or more information or informations should not be granted, but they never heard of a rule to shew cause why one or more mandamus or mandamuses should not issue.

And accordingly five rules were taken.

Hilary term, 1793.

I mean

I mean to say that this mode of drawing up a rule should not be considered as a matter of course. The rule here must be discharged with costs.

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PATTESON and COLERIDGE Js. concurred.

Rule discharged with costs.

DOE on the demise of JOSHUA MAYHEW *against* Monday,
ASBY. April 29th.

KELLY, in *Michaelmas* term 1837, obtained a rule calling on the lessor of the plaintiff to shew cause why all proceedings in this ejectment should not be stayed on payment of costs. The action was brought by reversioner against termor to enforce a forfeiture by breach of a covenant to repair within three months after notice from the lessor or his assigns. Notice had been given to repair in the three months expiring *June* 18th, 1837; the repairs continuing undone, declarations in ejectment had been served on the 9th of *August*, and the defendant had entered into the usual consent rule. On *November* 23d the present rule was obtained. A summons had been previously taken out for the same purpose, and the parties had attended before *Littledale J.* at chambers, *November* 17th, when the learned Judge held that he had no jurisdiction, and dismissed the summons. The affidavits in support of the rule stated that the repairs had, at the time of making this application, been done; that the defendant had proposed a meeting between his surveyor and the surveyor for the lessor of the plaintiff, and had offered to execute immediately,

In an action of ejectment on a forfeiture by breach of covenant to repair, the Court has no power to stay proceedings upon terms, if the lessor of the plaintiff does not consent.

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under the direction of the latter, any alteration or amendment which he might propose, and likewise to pay the costs of the action as between attorney and client; but that these proposals had been declined. It was further stated that the defendant held for the residue of a term of sixty-one years, under a lease, dated *September 1st*, 1789, at a ground rent of 5*l.* per annum, and that the lease was beneficial and of considerable value. The affidavits in answer stated that several important repairs had not been done till after the action was brought; and that some trifling ones still remained to be performed as late as *November 10th*. *Doe dem. De Rutzen v. Lewis (a)*, and an unreported case of *Doe dem. Gover v. Maberly* were cited in moving for the rule.

R. V. Richards and *Arnold* now shewed cause. This is an application which has never been made to a court of law; and even the courts of equity would not relieve in such a case. The rule in those courts is, that relief by injunction may be granted where the forfeiture attaches by nonpayment of a sum of money, the amount of which, with interest, may be calculated by the Court; but not where the breach of covenant consists in some other non-feasance, for which the reversioner must claim damages. This subject is very fully discussed, and the law laid down as now stated, in *Hill v. Barclay (b)*. In *Bracebridge v. Buckley (c)*, the Court of Exchequer refused equitable relief in a case of forfeiture by breach of a covenant to lay out 1000*l.* in repairs within a given time; and in *White v. Warner (d)*, where an injunction was moved for to restrain a landlord from suing

(a) 5 *A. & E.* 277.(b) 18 *Ves.* 56. And see 16 *Ves.* 402.(c) 2 *Price*, 200.(d) 2 *Mer.* 459.

at law upon the breach of a covenant to keep premises insured against fire, and the case was represented as one of great hardship, Lord Eldon C. said that the Court could not give relief against such a forfeiture upon the principle of compensation. The authorities on the subject are collected in *Eden on Injunctions*, p. 21. et seq. c. 2. and *Comyn on the Law of Landlord and Tenant*, p. 565. et seq. Book 4. c. 2. s. 3. (a). The only case in equity of any considerable weight, contradictory to those now cited, is *Sanders v. Pope* (b), where, on ejectment brought for a forfeiture by non-repair, Lord Erskine C. granted relief on terms of compensation to the landlord. That case was much discussed in *Hill v. Barclay* (c), and had circumstances of its own, commented upon by Lord Eldon in *Hill v. Barclay* (d), which prevent it from being an authority in the present case (e). *Hack v. Leonard* (g), where relief is said to have been granted in a case of non-repair, is mentioned by Lord Eldon in *Hill v. Barclay* (h) as a loose note, and occurs in 9 *Mod.*, a book of little authority. [*Littledale J.* The ninth *Mod.* is worse than the tenth.] As to the supposition that clauses of re-entry are to be unfavourably looked upon, Lord Tenterden said in *Doe dem. Davis v. Elsam* (i), "I do not think provisoes of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts. The parties agree to a tenancy on certain terms, and there is no hardship in binding them to those terms. In my view

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(a) 2d ed.

(b) 12 *Ves.* 282.(c) 16 *Ves.* 402.; 18 *Ves.* 56.(d) 18 *Ves.* 59.(e) See also note (83) to *Wadman v. Calcraft*, 10 *Ves.* 70. 2d ed.(g) 9 *Mod.* 91.(h) 18 *Ves.* 61(i) *M. & M.* 189.

of

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of cases of this sort the provisoes ought to be construed according to fair and obvious construction, without favour to either side." And where the re-entry was for non-payment of rent, this Court, since stat. 4 G. 2. c. 28., has refused between verdict and execution to stay proceedings in ejectment on payment of arrears and costs; *Doe dem. Harris v. Masters (a)*. [Lord Denman C. J. In *Doe dem. De Rutzen v. Lewis (b)*, which was cited in moving, the reversioner had elected to do the repairs himself and hold the lessee responsible; he had therefore waived the forfeiture.] *The Court* then enquired of

Kelly, who supported the rule, if there were any authority for the interference now claimed. None has been found: but *Doe dem. Gover v. Maberly*, a case determined by the Court of Common Pleas in *Hilary* term, 1836, was relied upon at the time of moving for this rule. The case is not reported; but it appears that the action was brought upon a forfeiture incurred by non-repair and non-payment of rent, and that the Court, after judgment, ordered the defendant to be replaced in possession upon terms (c). That seems to be an authority for the present application.

Lord

(a) 2 B. & C. 490.

(b) 5 A. & E. 277.

(c) By the papers in *Doe dem. Gover and Another v. Maberly*, it appears that the forfeiture was incurred by non-repair and non-payment of rent; ejectment was brought, issue joined, and notice of trial given; and the defendant then gave, and the lessor of the plaintiff accepted, a cognovit whereby the defendant agreed to withdraw his plea, and that unless he should pay, on or before *December 28th*, half the plaintiff's costs of the action and of withdrawing the record, and the arrangement to compromise the same, &c. and should pay, on *December 28th*, half the rent due *December 25th*, and unless he should pay the remaining halves of the costs and rent on *January 28th*, and should repair the premises within four months,

LORD DENMAN C. J. I am satisfied that the Court of Common Pleas, in the case referred to, must have done no more than put the case in a train of arrangement. If the order had been made in invitum as to the landlord, the decision would probably have been reported. It is quite clear that we have not authority to make the order desired; to do so we ought to have more powers in other respects than we now possess. Supposing that we were willing to make such an order, could we direct an issue, to ascertain whether the repairs were well done or not?

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DOX dem.
MAYHEW
against
Asst.

LITLEDALE J. We have no jurisdiction to make a rule absolute for staying these proceedings. All the authorities which have been cited, except one or two cases, shew that such a power does not exist in the present instance.

months, to the satisfaction of surveyors on each side, and unless defendant should within &c. appoint a surveyor for the purpose on his side, the lessor of the plaintiff was to be at liberty to issue a writ of possession, and also execution for the rent and costs, &c. Defendant failed to perform the stipulated terms by *December 28th*, and the lessor of the plaintiff signed judgment on *December 30th*, and had possession delivered by the sheriff. The defendant applied, on summons before a Judge at chambers, to have the judgment set aside on terms; the learned Judge thought he had no jurisdiction, but stayed proceedings for a time, that application might be made to the full Court. A rule nisi was obtained, *January 13th* 1836, for setting aside the judgment, on affidavits alleging surprise, excusing the default, and stating endeavours since made by defendant to complete the arrangement. They also shewed that the defendant's lease was beneficial. By a rule of *February 1st*, 1836 (after hearing *Talford Serjt.* for the plaintiff, and *Wilde Serjt.* for the defendant), it was ordered, that on payment, within one week, of the debt secured by the cognovit, and costs (as specified in the rule), possession should be restored to the defendant; and that the judgment should stand as a security for the due performance of the repairs pursuant to the stipulations in the cognovit.

PATTESON

1839.

DOE dem.
MAYHEW
against
ASBY.

PATTESON J. It is quite clear that we have no authority to make this rule absolute. From my note of the motion, I think that we granted the rule nisi under a mistaken impression of the facts. Supposing that we could interfere, it appears that there were repairs still undone when the action was brought.

COLERIDGE J. The strongest way in which this case could be put for the tenant would be, to shew that the affidavits disclose something which might have been an answer to the action. But they do not; and if they did, we could not try the question on affidavits.

Rule discharged.

Tuesday,
April 30th.

FAULKNER *against* CHEVELL.

Debt for penalties, under stat. 22 G. 2. c. 46. s. 14., for acting as attorney at the sessions of the place where defendant "executed the office" of deputy clerk of the peace. Plea, Not guilty. Held, that plaintiff was bound, upon this issue, to prove the actual exercise of the office by defendant; and that a finding by the jury, that defendant "had never acted" as such deputy, negatived the charge in the declaration.

DEBT for penalties under stat. 22 G. 2. c. 46. s. 14.

The declaration stated that one *Harris* was clerk of the peace of the town of *Cambridge*, and defendant his deputy as such clerk of the peace. That defendant, being such deputy, within the space of twelve months before the commencement of the suit, at the general quarter sessions of the peace holden in and for the said town in *June* 1834, being the town where defendant executed his office of such deputy, acted and presumed to act as attorney for one *J. D.*, by then, at

The town clerk, to whose office that of clerk of the peace had usually been incident, appointed defendant his deputy in the office of town clerk. Held that, for the purpose of this action, defendant was not deputy clerk of the peace; and semble, that even if the appointment made him such deputy, he was not liable to the penalties, if he abstained from acting, and the duties of clerk of the peace were always performed by the principal in person.

the

the said sessions, as the attorney of and for the said *J. D.*, conducting the prosecution of a certain indictment against one *F. H.*, at and upon the trial of a certain issue joined on the said indictment, and which issue was then tried at the said sessions, contrary to the form of the statute &c., whereby defendant forfeited the sum of 50*l.* &c. There were six other counts for six other penalties. Plea, Not Guilty (*a*).

1839.

FAULKNER
against
CHEVELL.

At the trial before *Park J.*, at the *Cambridge Lent* assizes 1837, it was contended, on the part of the plaintiff, that the plea admitted *Harris* to be clerk of the peace, and defendant his deputy. The learned Judge ruled otherwise. The plaintiff then proved the appointment of *Harris*, in 1833, to the office of town clerk of the borough of *Cambridge*, to be exercised by himself or deputy so long as he should demean himself properly in the said office, and in the execution of the "duties incident thereto;" together with all fees, profits &c., "in as ample and beneficial a manner as any other person or persons, theretofore holding and using the said office, held and enjoyed the same." The deputation by *Harris* to defendant recited his own election as town clerk, and appointed defendant to be his deputy "in the office of town clerk of the said borough, to have, hold, use, exercise and enjoy the office of deputy town clerk of the said borough," for the same time and on the same tenure as *Harris* himself. Evidence was then adduced to shew that the office of clerk of the peace was incident and united to that of town clerk; that the town clerks had, for many years, usually performed all the duties of clerk of the peace without any separate appointment, and that the deputy town clerk was, as such, also deputy clerk of the peace. It appeared that

(a) See *Faulkner v. Chevell*, 5 *A. & E.* 213.

the

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 FAULKNER
 against
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the justices at the sessions acted as such under commissions of the peace for the town, and were not charter justices.

On the part of the defendant, it was proved that he confined himself to the duties of town clerk, and *Harris* always officiated in person at the sessions as clerk of the peace. An appointment of *Harris* as clerk of the peace, in 1830, by the Duke of *Rutland*, who claimed to be *custos rotulorum* for the town, was also produced; but the legality of the appointment by the duke, and the duke's title to be *custos rotulorum*, were denied by the plaintiff. It was admitted that defendant had acted as attorney upon the occasions referred to in the declaration.

The jury, being asked by the learned Judge, "whether the defendant had ever acted as deputy clerk of the peace," found that he had not; whereupon plaintiff was nonsuited, with leave to move to enter a verdict for him for such penalties as the Court should think proper.

In the following *Easter* term, *Kelly* obtained a rule nisi according to the leave reserved, and now

Biggs Andrews and *Byles*, shewed cause. The point respecting the effect of the plea of not guilty is decided by *Earl Spencer v. Swannell* (a). [*Kelly*, contra, gave up this point.] There was no proof either that defendant was deputy clerk of the peace, or that he executed the office of such deputy. Both should have been proved in order to fix him with the penalties of the act (b), whereas the latter allegation, which is

(a) 3 M. & W. 154. See also *Jones v. Williams*, 4 M. & W. 375.

(b) Stat. 22 G. 2. c. 46. s. 14. is as follows: "And, to the end that justice may be impartially administered in the several general or quarter sessions of this kingdom, be it further enacted by the authority aforesaid,

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against
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the defendant a deputy in the latter also ; and it matters not that the appointment was restrained to the office of town clerk, for a deputy cannot be appointed with a less power than his principal ; *Parker v. Kett* (a). As to the finding of the jury, the word "act" does not occur in the statute, but the word "execute." An office is executed, in point of law, by the person who has been legally appointed to it, and the acting of the principal as clerk of the peace (which is admitted) is in law the acting of the deputy. It is mere matter of private arrangement, which shall do an act which either may officially execute ; and if the practising as an attorney may be legalised by a mere voluntary abstinence from performing the duties of the office, it is evident that the provisions of the act may be eluded by a juggle. *Hughes v. Statham* (b) shews that the statute cannot be evaded by an arrangement indirectly defeating its object. In *Stanley v. Dodd* (c) it was held that a party who was qualified to be a guardian of the poor by reason of an estate, and who thereby became a guardian, ipso facto, by virtue of a local act, was liable to a penalty for supplying goods to the poor under 55 G. 3. c. 137. s. 6., although he was not proved to have acted as guardian.

Lord DENMAN C. J. This rule must be discharged and the nonsuit stand. The declaration properly alleges, that the defendant executed the office of deputy clerk of the peace, but the evidence does not support the allegation. There was no sufficient evidence that the defendant was deputy clerk of the peace, and none at all

(a) 1 *Lord Ray*. 658. *S. C.* 1 *Salk*. 95. (b) 4 *B. & C.* 187.

(c) 1 *Dowl. & Ry.* 397. ; and see *Stanley v. Dodd*, 2 *Dowl. & Ry.* 809.

that

that he acted in that capacity. I cannot assent to the doctrine, that the acting of *Harris* was the acting of his deputy, especially as the declaration mentions both the deputy and the principal, and must be therefore taken to mean an acting by the former and not by the latter. The defendant may have accepted the office of deputy town clerk without any intention on the part of himself or of his principal that he should perform the duties of clerk of the peace. Where the two offices happen to be united in the same person, there is certainly some danger that the provision of the legislature may be evaded by a private arrangement between the principal and his deputy; but we must adhere to the words of the statute, which are clear. The decision in *Stanley v. Dodd (a)* is founded on language very different from that used in 22 G. 2. c. 46., and is therefore inapplicable here.

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LITLEDAL J. The appointment distinctly makes the defendant deputy town clerk, and not deputy clerk of the peace. The defendant is not shewn to have filled the latter office at all.

PATTERSON J. I am not satisfied that the defendant filled the office of deputy clerk of the peace. The two offices held by *Harris* are not one and the same office, but different ones filled by the same person. The defendant may lawfully be appointed deputy as to one, and not as to the other. Even if he held the office, he never executed the duties of it within the meaning of the statute. The stat. 55 G. 3. c. 137. s. 6. provides that

(a) 1 Dowl. & Ry. 397.

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goods shall not be supplied by overseers or others "in whose hands" the management &c. of the poor "may be placed" in any parish "for which he or they shall be appointed as such, during the time which he or they shall retain such appointment." This language is very different from that of 22 G. 2. c. 46. s. 14.

COLERIDGE J. The plaintiff must prove an acting as deputy clerk of the peace at the sessions or place where he is alleged to have acted as an attorney. It is a new doctrine to maintain that an acting by the principal is an acting of the deputy. There are many cases in which the act of the deputy is the constructive act of the principal; but the converse does not hold.

Rule discharged.

Wednesday,
May 1st.

WILSON against RAY.

Plaintiff being about to compound with his creditors, defendant, a creditor, refused to subscribe the deed unless he were paid in full. Plaintiff, to obtain his signature, gave a bill, payable to defendant's agent, for the difference between 20s. in

ASSUMPSIT (declaration of 22d November, 1836) for money had and received, and on an account stated. Plea. Non assumpsit. On the trial before Lord Denman C. J., at the sittings in London after Easter term, 1837, it appeared that the plaintiff, on May 6th, 1833, compounded by deed with his creditors, one of whom was the present defendant. The defendant, when requested to subscribe the deed, had refused to do so unless he had 20s. in the pound; and the plaintiff, to

the pound and 8s., the proportion compounded for. Defendant then signed the deed. Plaintiff did not honour the bill when due; but, on subsequent application, he paid it, some months after the dishonour, by two instalments, to the payee, and defendant received the money. The other creditors were paid according to the deed. Held, that plaintiff could not recover back the amount paid to defendant above 8s. in the pound; for that the transaction had been closed by a voluntary payment with full knowledge of the facts, and ought not to be re-opened. And that it made no difference that the sum in question had not been recovered by action.

obtain

obtain his signature, accepted a bill of exchange drawn for this purpose by *William Preston*, the defendant's clerk, dated *April 3d*, 1833, for the payment, at nine months, of *29l. 16s.*, the difference between *8s.* and *20s.* in the pound on the defendant's debt. The bill was not honoured when due, but, on subsequent application, the plaintiff paid the amount by two instalments, in *February* and *May* 1834, to *Preston*, who placed the amount to the plaintiff's credit with the defendant. The *8s.* in the pound was also paid. (a) The plaintiff went on dealing with the defendant, and receiving goods from him, till the expiration of some months after the last instalment was paid. The defendant's counsel objected that, the payment having been voluntary, this action did not lie. The Lord Chief Justice thought otherwise, but reserved leave to move to enter a nonsuit, and the plaintiff had a verdict for *29l. 16s.*

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against
RAY.

Kelly, in *Trinity* term 1837, moved for a rule to shew cause why a nonsuit should not be entered. This action is grounded on a misconception of *Cockshott v. Bennett* (b) and other cases. It is true that if, in the present case, *Ray* had been holder of the bill and attempted to enforce payment of it by action, the circumstances under which it was extorted would have been a good defence; or if *Ray* had negotiated the bill to a bonâ fide holder, who had sued *Wilson* upon it, *Wilson* would have been without defence in such an action, but might have had his action over against *Ray* for the amount recovered against himself: *Smith v. Cuff* (c).

(a) It was stated in the course of discussion, when the after-mentioned rule was moved for, that all the creditors were paid *8s.* in the pound.

(b) 2 *T. R.* 763.

(c) 6 *M. & S.* 160.

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 RAY.

But here the bill had not been negotiated, and all the facts shew that the payment was voluntary. [Lord *Denman* C. J. The payee might at any time have placed the bill in the hands of a bonâ fide holder.] It was still in his own hands when paid. [Lord *Denman* C. J. The fact was, that the plaintiff paid it rather than lose the credit which he had with *Ray*.] The payment was made voluntarily and with knowledge of the facts; this case, therefore, falls within the principle laid down upon the subject in *Brisbane v. Dacres* (a). [Lord *Denman* C. J. Nothing unlawful was done there; the parties only mistook their rights.] In *Took v. Tuck* (b), where the defendant had compounded with his creditors (but it did not appear to what extent the composition had been carried into effect); and some time after that arrangement the defendant gave a bond for the whole amount of his debt to one of the creditors, the Court of Common Pleas held that such bond might be enforced, though it would have been otherwise if a bond or agreement to the same effect had been entered into before or at the time of the composition. Here the bill was given in pursuance of an original unlawful contract; the unlawfulness consisted in the undue pressure upon the debtor at the time of making the agreement; but the bill was paid under no unlawful pressure. *Ray* had not then the power, as a creditor, of enforcing any right against *Wilson*, or withholding any benefit from him; there was nothing to deter *Wilson* from availing himself of any protection the law might give him against *Ray*; therefore he made the payment voluntarily. He went on dealing with *Ray* for some time afterwards, and more

(a) 5 Taunt. 143.

(b) 4 Bing. 224. See *Tuck v. Tooke* (S. C. in Error), 9 B. & C. 437.

than

than two years passed before this action was commenced. [*Patteson* J. mentioned *Turner v. Hoole* (a).] Lord *Kenyon* held, in *Fulham v. Down* (b) "that where a voluntary payment was made of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity, (or as expressed by Mr. *Bearcroft*, unless to redeem, or preserve your person or goods,) it is not the subject of an action for money had and received. The law, if so held, would subject all accounts and settlements between parties to revision." [*Patteson* J. It does not appear that the payment in that case would have been in fraud of any third party.] Here every creditor had been paid the amount of his composition.

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 WILSON
against
RAY.

A rule nisi was granted. In this term (*April* 30th),

Platt and *R. V. Richards* shewed cause. In the cases where it has been held that money voluntarily paid should be retained by the party receiving it, there was no fraud in the first instance. Here the bill was given to *Ray* in fraud of the other creditors; no right could be acquired by such fraud, and the 29*l.* 16*s.* never ceased to be the money of *Wilson*. The payment here was not in any sense voluntary; there appears to have been an urgency, the plaintiff paying an instalment before he had means to pay the whole. *The Duke de Cadaval v. Collins* (c) is, in principle, not distinguishable from this case. [Lord *Denman* C. J. It would be more like if *Ray* had obtained the money when he executed the

(a) *Dowling & Ryland's Nisi Prius Cases*, (usually annexed, as a supplement, to 2 *D. & R.*) 27.

(b) 6 *Esp. N. P. C.* 26. note.

(c) 4 *A. & E.* 858.

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deed. The question here is, why *Wilson* could not as well have resisted the demand upon the bill, as bring this action.] In *The Duke de Cadaval v. Collins* (a) the Lord Chief Justice, after stating the real question to be, whether the money is still the plaintiff's, adds, "How is it shewn not to be so? Why, by striving to give effect to a fraud." "This case differs from all which have been cited as being otherwise decided: in none of those was the *bonâ fides* negatived." The same argument decides the present case. That the original transaction here was invalid, results from all the cases, beginning with *Cockshott v. Bennett* (b). In *Smith v. Cyff* (c) the plaintiff had paid the bill, in the hands of a *bonâ fide* holder, against whom he could have no defence; and here, *Wilson* would have been similarly situated in an action brought by *Preston*, unless he could have identified *Preston* with *Ray*. *Turner v. Hoole* (d) decides the present case. There the defendant, having, with other creditors of the plaintiff, executed a composition deed, afterwards induced the plaintiff to accept bills to the full amount of his demand, which, though dated before, were drawn after the execution of the deed. The plaintiff paid the bills, after legal proceedings had been taken against him, and then brought an action of money had and received for the difference between what he had so paid and the composition secured by the deed; and *Abbott C. J.* held, at nisi prius, that the defendant was liable to refund that surplus, the transaction being a fraud, either upon the insolvent or upon the other creditors. [Lord *Denman*

(a) 4 A. & E. 858.

(b) 2 T. R. 763.

(c) 6 M. & S. 160.

(d) D. & R. N. P. C. 27.

C. J. I do not see how it was a fraud, being subsequent to the composition.] *Turner v. Hoole* (a) was relied upon as law by the Court of Common Pleas in *Alsager v. Spalding* (b). In *Coleman v. Waller* (c) the principle of *Cockshott v. Bennett* (d) was extended to the case where a creditor, as the consideration for his entering into a composition deed, obtained, not from the debtor but from a third person, security for his whole debt. *Hills v. Street* (e) is among the instances which shew what may be considered compulsory payments, though not enforced by actual process of law. The Courts have always been anxious, in the case of composition deeds, to preserve complete bona fides among the creditors.

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Kelly, contra. If there had appeared in this case either fraud, extortion, duress, or any kind of compulsion, the defendant could not retain the sum now claimed. And it may be admitted that if he had sued upon the bill he could not have recovered, the giving of it being an undue preference. The single authority of *Turner v. Hoole* (a) is against the plaintiff; but that, if rightly reported, appears to be bad law; and is contrary to all the other decisions. [Lord Denman C. J. I feel no difficulty except from that case. Perhaps we had better take time to look into it. The antedating there seems to connect the transaction with some fraud.] The plaintiff there should have resisted the proceedings commenced against him. But perhaps it may have been thought that, as the proceedings were upon bills

(a) *D. & R. N. P. C.* 27.(b) 4 *New Ca.* 407.(c) 3 *Y. & J.* 212.(d) 2 *T. R.* 763.(e) 5 *Bing.* 37.

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 against
 RAY.

of exchange on which something (namely, the amount of the composition) was confessedly due, the insolvent was not called upon to defend, and might resort to his cross action. [*Patteson J.* He might have resisted pro tanto.]

The case stood over, and to-day,

Lord DENMAN C. J. (after reading aloud the case of *Turner v. Hoole* (a), and consulting the other Judges) said :

This rule must be made absolute. The case which we wished to have more fully before us is undoubtedly a case in point against the present defendant, but the defence here relied upon was not presented to Lord Tenterden. He considered that case, as I on the trial considered the present case, to be decided by the principle clearly laid down in *Cockshott v. Bennett* (b), often recognized and never impeached; but he was not reminded of another principle of at least equal importance which was established in *Marriott v. Hampton* (c), that what a party recovers from another by legal process, without fraud, the loser shall never recover back by virtue of any facts which could have availed him in the former proceeding. Money so recovered was not received to the plaintiff's use: it was received to the use of the successful party by authority of law. If any error was committed in the former proceeding, still the plaintiff is estopped from proving it after failing to do so at that time. If this were otherwise, the rights of parties could never be finally settled by the most solemn proceeding; and verdicts and judgments might be ren-

(a) *Dowl. & R. N. P. C.* 27.

(b) 2 *T. R.* 763.

(c) 7 *T. R.* 269.

dered

dered nugatory by evidence which, if produced at the proper season, might have received a complete answer. The *Duke de Cadaval's* case (a) was not intended to be, nor is it, inconsistent with this doctrine. It turned on fraud and extortion practised by an abuse of ex parte legal process by one who knew that he had no right to the money he obtained. That money still remained the property of the Duke, though unjustly taken out of his possession. But where the recovery is by legal process, the loser never can contend that the property is his.

I am reminded by my brother *Patteson*, that in the present case no action was brought on the bills in question but they were voluntarily paid after they became due. I think the same principle applies. This plaintiff might have then refused payment, and if the defendant's agent, the drawer, had brought his action on the acceptance, he had the opportunity of defending himself by the illegal nature of the consideration. He waived the advantage, and voluntarily paid the bills with full knowledge of all the facts. I am of opinion that it is not now open to him to deny that he was liable on them.

LITLEDALE J. I am entirely of the same opinion, and I think the circumstance just adverted to makes no difference.

PATTESON and COLERIDGE Js. concurred.

Rule absolute.

(a) *The Duke de Cadaval v. Collins*, 4 A. & E. 858.

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Thursday,
May 2d.

GREGG *against* WELLS.

The owner of goods, who stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them *bonâ fide*, cannot recover them from the vendee.

G., the owner of the fittings of a public-house, demised them to D., who thereupon became tenant of the house to a third party, under an agreement which gave his landlord a lien on the fittings. G. was present at the execution of such agreement. D. afterwards sold the good-will and fittings, without G.'s knowledge or assent, to W., who, being told by the landlord that D. was his tenant, bought them *bonâ fide*, in ignorance of G.'s title, and was accepted by the landlord as tenant in the place of D.

Held that G. could not maintain trover for the fittings against W. And that the defence was admissible on the plea of *not possessed*.

TROVER for goods, being the fittings and furniture of a public house. Pleas, 1. Not guilty. 2. Plaintiff not possessed of the goods as of his own property.

On the trial before Lord Denman C. J., at the *Westminster* sittings after *Trinity* term, 1837, it appeared that, in 1835, plaintiff bought the good will, fittings, &c., of the public house, and put in *Heath*, a relation, as tenant, in whose name the business was carried on, and the requisite licences were transferred. The premises belonged to Messrs. *Elliott* and Co., brewers, who accepted *Heath* as tenant from year to year at the rent of seventy guineas. As the business proved unprofitable, *Heath* gave it up; and plaintiff, in *January* 1836, entered into the following agreement with one *Durham*.

"Memorandum of agreement, made this 2d day of *January* 1836, between *William Henry Gregg*, of the one part, and *Alexander Durham*, of the other part. The said *W. H. Gregg* hereby agrees to let, and the said *A. Durham* hereby agrees to take, the public house called" &c., "with the fittings up of the same, and the several fixtures and things now in and upon the same, to hold to the said *A. Durham* from *Christmas* last for one year, at the yearly rent of 90*l.*, payable quarterly on the usual days; and the said *A. Durham* agrees to pay the said rent, and all taxes and outgoings, including sewer rate and land tax, and to keep all the premises in good and substantial repair, to use the said premises as a

public

public house, and for no other purpose; and will do every thing to preserve the same as a public house, and duly licensed as the same now is; to take due care of and preserve all the fixtures and fittings up now in the said premises, and, at the expiration of one year, surrender the same in good preservation together with the said premises, unto the said *W. H. Gregg*; provided always the said *A. Durham* shall be at liberty to purchase all the interest and right of the said *W. H. Gregg* in and to the said premises, fittings up, and fixtures, and the licence thereof, at any time during the said twelve months for which the same are agreed to be let, for the sum of 280*l.*; and upon payment of the said sum of 280*l.* this agreement shall be at end, except that the said *A. Durham* shall be liable to pay a proportion of rent up to the time of the payment of the said purchase-money. In witness," &c.

Plaintiff handed to *Durham* an inventory of the furniture, including the goods in question, being the original inventory which he had himself received when he bought the same in 1835. Plaintiff and *Durham* then went to Messrs. *Elliott*, who, upon being paid by the plaintiff the balance of *Heath's* account, agreed to accept *Durham* as their tenant from year to year at the same rent of seventy guineas. The written agreement entered into on this occasion between Messrs. *Elliott* and *Durham* provided "that *Durham* should quit upon notice at the end of any three months, and should then deliver up his licences to such persons as Messrs. *Elliott* should appoint, and that whenever *Durham* should quit, all arrears of rent, taxes, or other monies due to Messrs. *Elliott* should be deducted by the brokers from the valuation of the goods and effects of *Durham*, and paid to Messrs,

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Messrs. *Elliott*." *Gregg*, the plaintiff, was present at the signing of this agreement, on which occasion a change in the time of its commencement was made; but he was not known to, or recognised by, Messrs. *Elliott*, except as a friend of *Heath*, on whose behalf they supposed that he acted; nor were they acquainted with the agreement between plaintiff and *Durham*. *Durham* took possession, insured the premises, and carried on business in his own name; he paid the ground rent to Messrs. *Elliott*, and obtained receipts in his own name, made considerable alterations in the fittings, and in every respect appeared to be, and acted as, owner and tenant of the property until *October* 1836, when he advertised the good-will and furniture for sale, and eventually (*October* 1836) sold the same to the defendant. Defendant had been previously referred by *Durham* to Messrs. *Elliott*, who informed him that *Durham* was their tenant. Defendant was then admitted tenant by Messrs. *Elliott* in the place of *Durham*. At the expiration of the year of *Durham*'s agreement with the plaintiff, the latter demanded the furniture, fittings, &c. of the defendant, to whom he had previously (but not until after the purchase by defendant, and substitution of him as tenant to Messrs. *Elliott*) notified that they belonged to him. Defendant refused to deliver them. There was no proof that plaintiff knew of, or sanctioned, the sale by *Durham* to defendant, or that defendant was not a bonâ fide purchaser from *Durham* in ignorance of any claim or title of the plaintiff.

The Lord Chief Justice told the jury that, if they were satisfied the plaintiff had so allowed *Durham* to deal with the property as to hold him out to the world as the owner of it, and the defendant had been thereby induced

induced to purchase it bonâ fide, in the belief that it was *Durham's*, then the defendant was entitled to a verdict. The jury found for the defendant.

In *Michaelmas* term following *Platt* obtained a rule nisi for a new trial, on the ground of misdirection and insufficiency of evidence.

1839.

GAYO
against
WELLS.

Sir *F. Pollock* and *Chambers* now shewed cause. There was evidence that the plaintiff was privy to the contents of the agreement between Messrs. *Elliott* and *Durham*, and permitted *Durham* to assume the character of tenant to them, and owner of the fixtures and furniture. When he saw the landlords calculating on the value of the effects on the premises as a security for arrears due to themselves, it was his duty to inform them that the effects did not belong to their tenant. In concealing from them the state of things between him and *Durham*, he enabled the latter to obtain a credit with them, and with others who might deal with him, which he would not otherwise have had. *Pickard v. Sears* (a) is in point, and establishes the general principle that one who, by his language or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own position, cannot afterwards aver a different state of things against the party whom he has misled. *Hunsden v. Cheyney* (b) and *Hill v. Gray* (c) are to the same effect. There is no distinction in principle, although the party who enables another to assume the credit of ownership may not be actually present when the act is done by which the third party is deceived; nor

(a) 6 *A. & E.* 469.(b) 2 *Vern.* 150.(c) 1 *Stark. N. P. C.* 434.

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is it material here that the title to the property may have been really vested in *Gregg* at the time of the sale by *Durham*, and that the latter may have deceived *Gregg*; for where one of two persons is to lose by the fraud of a third, it is fit that he should be the loser who has put the fraudulent party in a condition to practise the imposition. On this ground it has even been held that if the bailee of goods deliver them to a stranger, the bailor cannot bring trover against the stranger; *Bro. Ab. Tresp.* pl. 216., cited 7 *Bac. Ab.* 803. *Trover*, C. (a), although this case cannot, perhaps, be supported in its full extent. *Hern v. Nichols* (b), and *Hartop v. Hoare* (c) recognize the same principle. [*Patteson* J. There are cases in which a defendant has been allowed to set off a debt due from a party in the apparent possession or ownership of goods against a demand by the real owner (d).] The facts here would enable the defendant to maintain an action on the case for deceit against the plaintiff, if he were now obliged to give up the property to him: *Com. Dig. Action upon the Case for a Deceit*, (A 8.) (A 10.); *Pilmore v. Hood* (e): so that it would tend to circuity of action, if the plaintiff were now permitted to recover.

Platt and *Knowles*, contra. It is not denied that the goods really belonged to the plaintiff. He ought therefore to recover for them, unless actual misconduct on his part can be proved. It does not follow that *Gregg* knew the contents of the whole agreement between Messrs. *Elliott* and *Durham*, merely because he appears to have

(a) 7th ed. The citation in *Bacon* is incorrect: In *Bro. Ab.* it is only said that *trespass* will not lie.

(b) 1 *Salk.* 289.

(c) 1 *Wilson*, 8.

(d) See *Carr. v. Hinchliff*, 4 B. & C. 547.

(e) 5 *New Ca.* 97.

been

been privy to an alteration in one of its terms. Even if he knew the contents of it, a case of fraud is not established; for it is not to be presumed that *Durham* had no other "goods and effects" from which a deduction might be made; and, supposing that *Gregg's* goods were intended, yet as the agreement between him and *Durham* provided that these should become the property of *Durham* on payment of 280*l.* during the year, there was no deception, nor representation inconsistent with what might have been eventually the fact. Besides the misrepresentation, if any, was to Messrs. *Elliott* and not to the defendant. In *Pickard v. Sears* (a) the mortgagee, who brought the action, had made himself a party to the sale, and had sanctioned it. The rule of law must prevail in favour of the real owner, unless the Court shall decide that he was bound, on an attempt of the lessee to deal with the goods, to take active measures for notifying and asserting his claim. Nothing but a sale in market overt will bar the true owner. *Wilkinson v. King* (b), *Loeschman v. Machin* (c). Furniture, demised with the premises, will not pass to the assignees of the lessee, because a third party ought not to presume that it belongs to the tenant. [*Patteson J.* A distinction has been made between ordinary furniture, and furniture used in the bankrupt's trade and business (d). Lord *Denman C. J.* It is always a question of fact, and not of law, whether goods are in the order and disposition of the bankrupt.] At all events, the plea should have been special, and not a mere denial of the plaintiff's property, which is undisputed. The mere possession of *Durham* gave no right to convey

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(a) 6 *A. & E.* 469.(b) 2 *Camp.* 335.(c) 2 *Stark. N. P. C.* 311.(d) See *Lingham v. Biggs*, 1 *B. & P.* 82. 88.

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to the defendant; *Jaullery v. Britten* (a); whereas the plaintiff's interest gives him a *prima facie* title to recover. [Coleridge J. In *Owen v. Knight* (b) the facts stated in the third plea, viz., that the plaintiff had delivered the indenture to one *Feary* to raise money on it, and he had pledged it to the defendant, were held to be admissible on the second plea of "not possessed." In that case, too, the defendant was allowed to set up a lien, although the agent, *Feary*, had exceeded his authority, and the plaintiff had not been directly a party to any misrepresentation to, or deception upon, the defendant.] There the plaintiff, at all events, delivered the lease to *Feary* for the purpose of parting with the possession of it as security for a loan, although the precise directions given to him were not pursued.

LITLEDALE J. There are two questions: first, was the direction to the jury right? I am of opinion that it was, and that the case falls within the rule laid down in *Pickard v. Sears* (c). Next, was the verdict supported by the evidence? On this head there was certainly evidence to go to the jury, and I cannot say they were wrong.

PATTESON J. The direction was right, and the facts support the verdict. The goods are demised with the premises by the plaintiff to *Durham* for one year, with liberty to purchase the plaintiff's interest in them within that period. I am far from saying that this alone would have given *Durham* any authority to sell the goods; but *Durham* then becomes tenant to Messrs.

(a) 4 *New Ca.* 242.(b) 4 *New Ca.* 54.(c) 6 *A. & E.* 469.

Elliott,

Elliott, under an agreement at variance with the former one, and entered into in the presence of the plaintiff himself, containing a clause to enable Messrs. *Elliott* to deduct arrears, due from *Durham*, from the valuation of his goods and effects. The plaintiff does not then say a word about his own title to the goods. Had Messrs. *Elliott* been the defendants, the point would have been identical with that in *Pickard v. Sears (a)*. Here the defendant is referred by *Durham* to Messrs. *Elliott*, by whom he is told that *Durham* is their tenant. The error is, therefore, one entirely originating in the fault of the plaintiff, who held out *Durham* as owner, through the medium of Messrs. *Elliott*.

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COLERIDGE J. Suppose the action had been between the plaintiff and Messrs. *Elliott*; the latter would have had good ground for believing *Durham* to be the owner in consequence of the plaintiff's representation. If so, then Messrs. *Elliott* have a title as against the plaintiff, which they can convey to the defendant. As between the plaintiff and Messrs. *Elliott*, the plaintiff is known only as the friend of *Heath* the previous tenant; and he stands by, without interposition or objection, whilst Messrs. *Elliott* and *Durham* become parties to an instrument which gives Messrs. *Elliott* the right of interfering with the furniture of the house under certain circumstances. It is through the act, or the silence, of the plaintiff, that *Durham* is thus enabled to hold himself out as the owner.

Lord DENMAN C. J. *Pickard v. Sears (a)* was in my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid

(a) 6 A. & E. 469.

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down. A party, who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. The defence here is, in substance, collusion between *Durham* and the plaintiff. As to the evidence; I think a second jury would find the same verdict, and would be justified in finding it.

Rule discharged.

Thursday,
May 2d.

DAVIES against WILKINSON.

Promise in
writing, as
follows: —

"I agree to pay D. 695*l.* at four instalments, viz. the first on," &c. "being 200*l.*;" and so on, specifying three others, the four amounting to 600*l.*; "the remainder, 95*l.*, to go as a set-off for an order of R. to T., and the remainder of his debt owing from D. to him."

Held, not a promissory note, for such note must be entire, and this instrument contained a pro-

mise to pay, joined with an agreement for something else. But

Held good evidence of an agreement to pay, in consideration of being found indebted on a statement of account; though no consideration was expressly stated on the instrument itself.

ASSUMPSIT. The first count stated that plaintiff and defendant, on the 7th *June* 1833, came to an account of and concerning divers monies due and owing by defendant to plaintiff, and then unpaid, and upon that account defendant was found indebted to plaintiff in a large sum, viz. 695*l.* of lawful &c., and being so found indebted he, defendant, in consideration thereof, then, viz. on &c., agreed and promised to pay to plaintiff or his order the said sum of 695*l.* at four instalments; viz., the first instalment, being 200*l.*, on *Monday* then next, 10th *June*, in the year last aforesaid; the second instalment, being 150*l.*, at a certain day, time, or period then to come, and described as the settling day at *Doncaster*, after the *St. Leger*, in the year last aforesaid; the third instalment, being 150*l.*, at a certain other day, time, or period then to come, and

described

described as the settling day after *Epsom*, 1834; and the **fourth** instalment, being 100*l.*, at a certain day, time, or period then to come, and described as the settling day at *Doncaster*, in the year 1834; and that the remainder of the said sum of 695*l.*, being 95*l.*, should go as a set-off for an order of one Mr. *Reynolds* to one Mr. *Thompson*, and the remainder of the debt owing from plaintiff to him the said Mr. *Thompson*. Averment, that the day, time, or period described as the settling day at *Doncaster* arrived and took place after the making of the said promise of defendant, and before the commencement of this suit, viz. 18th *September* 1833; that the day, time, or period described as the settling day after *Epsom* 1834, arrived and took place after the making, &c. and before the commencement, &c., viz. 3d *June* 1834; and that the day, time, or period described as the settling day at *Doncaster*, 1834, arrived and took place after the making, &c., and before the commencement, &c., viz. 17th *September* in the year last aforesaid; and that all the days, times, or periods on and at which respectively the said four several instalments of 200*l.*, 150*l.*, 150*l.*, and 100*l.* of the said sum of 695*l.* were to be paid have long since elapsed. Breach, that although defendant, in part performance of his said promise, did pay to plaintiff the said first instalment of 200*l.* on the 10th *June*, 1833, aforesaid, yet he has not further regarded his promise, but has disregarded the same, and has not paid to plaintiff the said several other instalments of 150*l.*, 150*l.*, and 100*l.* of the said sum of 695*l.*, or any of them, or any part thereof; and the same, amounting in the whole to a large sum, viz. 400*l.*, still are and each of them is wholly due and unpaid, contrary to the

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tenor and effect of the said promise of defendant, and in breach thereof. The second count was on an account stated, in the common form.

Pleas. 1. Non assumpsit. 2. That before the making of the promises, and before either of the accounts was stated, viz. on, &c., and on divers other days, &c., defendant lost to plaintiff, and plaintiff then won of defendant, divers sums of money, in the whole amounting to a large sum, viz. 700*l.*, by betting on certain horse-races which were then run, and that each and every of the bets by which the said monies were so won and lost as aforesaid exceeded the sum of 10*l.*; and that the said accounts were respectively come to and stated, and the promises in the declaration mentioned were respectively made, for and in respect of the said monies so lost by and won of defendant as aforesaid, and not on any other account, or in any other manner whatsoever. Verification. Replication to this plea, denying that the accounts were come to or stated, or the promises made, for or in respect of monies lost by or won of defendant by betting on horse-races for sums exceeding 10*l.*, in manner and form, &c. Conclusion to the country. Issue thereon.

On the trial, before *Littledale J.*, at the *Middlesex* sittings in *Michaelmas* term, 1837, the plaintiff gave in evidence the following document, signed by defendant, bearing an agreement stamp:—

“I agree to pay to Mr. *Charles Davies*, or his order, the sum of 695*l.*, at four instalments; viz. the first instalment to be paid on *Monday* next, *June 10th*, 1833, being 200*l.*: the second on the settling day at *Doncaster* after the *St. Leger*, being 150*l.*: the third on the settling day at *Doncaster*, after *Epsom*, 1834, being 150*l.*: and the

the ~~four~~th on the settling-day at *Doncaster* after the *St. Leger*, 1834, being 100*l.*: the remainder, 95*l.*, to go as a set-off for an order of *Mr. Reynolds* to *Mr. Thompson*, and the remainder of his debt owing from *C. Davies* to him—

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(Signed) “*James Wilkinson.*”

The defendant's counsel objected, first, that the instrument was a promissory note, and should have been stamped accordingly, to which point he cited *Green v. Davies (a)*. Secondly, that it varied from the first count, inasmuch as it did not shew any debt or statement of account prior to the agreement; and that it did not support the second count. Thirdly, that the instrument shewed no consideration for the promise. The learned Judge received the evidence, but reserved leave to move to enter a nonsuit. Evidence was then given of money having been lent by plaintiff to defendant some time before the making of the promise. The defendant, in support of his second plea, gave evidence of a betting account stated between the parties at a more recent period, in consequence of which, it was said, the undertaking in question was given. The learned Judge left it to the jury to say whether the defendant's debt to the plaintiff was incurred by gambling or by borrowing; and the plaintiff had a verdict for 400*l.* *Platt*, in the same term, moved for a rule to shew cause why a nonsuit should not be entered on the grounds above stated; or why a new trial should not be had, on affidavits alleging surprise, and contradicting the evidence of a loan. Affidavits in answer were filed for the plaintiff.

(a) 4 B. & C. 235.

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Thesiger and *Humphrey* now shewed cause. *Green v. Davies* (a) is distinguishable, because there the instrument held to be a promissory note contained no agreement but to pay a sum of money with interest. Here it is added that a sum of money shall be placed to a particular account in the way of set-off. *Leeds v. Lancashire* (b) is an authority for the plaintiff; so also is *Bolton v. Dugdale* (c), a case much resembling the present. Here the document is (as the Lord Chief Justice said in that case) "an agreement engrafted on a note." If the instrument in question be a promissory note, to whom and for what sum is it a note? It does not appear who would be entitled to demand the 95*l.*, or what claims of *Reynolds*, and against whom, the supposed note was intended to meet. The objection of variance, supposing it well founded, does not affect the second count. As to the suggestion that the instrument shews only a nudum pactum, it is not set up as containing the terms of an agreement: it is a bare acknowledgment, and equivalent to an I O U.

Platt and *Ball*, contra. First, this is a promissory note for the payment of a sum by instalments, the whole money to be paid being definite and certain, according to stat. 55 G. 3. c. 184. sched. part 1. tit. *Promissory Note*. The first part is, in form, a promise to pay the plaintiff or order 695*l.*; and supposing that the latter part is, as to 95*l.*, something different from a promissory note, that does not change the nature of the instrument as to the 600*l.* *Leeds v. Lancashire* (b) is consistent with the defendant's view of this case. There the in-

(a) 4 B. & C. 235. (b) 2 Camp. 205. (c) 4 B. & Ad. 619.

strument

strument was held not to be a promissory note, because, as between the parties to the action, the memorandum indorsed was necessarily incorporated with the whole matter on the face of the document. In *Bolton v. Dugdale* (a) the writing was a good agreement, and could not be a promissory note, for the sum payable was rendered uncertain by words necessarily affecting the whole. Here the instrument might have been negotiated as a note for 600*l.* The words added as to the 95*l.* are not matter of agreement, for the plaintiff agrees to nothing; they merely state that that sum is carried to account in a particular manner. An instrument containing such a clause is not the less a promissory note: *Haussoullier v. Hartinck* (b), *Dixon v. Nuttall* (c). Secondly, if this is an agreement, the consideration was material, for an agreement consists of consideration and promise; *Wain v. Warlters* (d); and here the written agreement is not that stated in the declaration, for the promise to pay is alleged to have been made in consideration of something which appeared on stating an account, whereas nothing of the kind is found in the written instrument. [Patteson J. Might not the consideration be proved by parol?] No such evidence was given. And, lastly, the agreement, if any appears on this paper, is nudum pactum, no consideration appearing. It is indeed said, *Com. Dig. Agreement* (B 2.), that, "where an agreement or contract is in writing, the consideration is not inquirable;" but that means where it is by deed or

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(a) 4 B. & Ad. 619. S. C. 4 Nev. & M. 412. See *Wise v. Charlton*, 4 A. & E. 786.

(b) 7 T. R. 733.

(c) 6 Car. & P. 320. S. C. in banc, but this point not discussed, 1 Cro. M. & R. 307.

(d) 5 East, 10.

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record (a). The instrument in question, if considered as a promissory note unstamped, would clearly not be evidence, even on the general count: *Green v. Davies* (b); and an I O U does not prove the actual statement of an account; it is a mere admission of a debt, and was treated so in *Childers v. Boulnois* (c), though it has been received as evidence on the count upon an account stated: *Payne v. Jenkins* (d).

(The argument on the affidavits is omitted.)

Lord DENMAN C. J. The first objection is, that this instrument was improperly received in evidence, being a promissory note not duly stamped. It is a note, up to a certain point, but it ends, "95*l.* to go as a set-off for an order of Mr. Reynolds to Mr. Thompson, and the remainder of his debt owing from C. Davies to him." I think that takes from it the character of a promissory note, and makes it an agreement, and that it was properly received. Secondly, it is said that no consideration appears, to support the first count. But the promise itself imports a consideration, and he who says, "I promise to pay you 100*l.*," may, without any violent construction, be supposed to say, "We have settled accounts, and I am to pay you 100*l.*" Thirdly, it is objected that the instrument proved merely shewed nudum pactum; but the words "I agree to pay" are a perfect promise, and they import a consideration. It was not necessary that the document put in should

(a) 7 T. R. 350. note (a) (*Rann v. Hughes*), is cited for this in 1 Com. Dig. 530., note (f), 5th (*Hammond's*) ed.

(b) 4 B. & C. 235.

(c) *Dowl. & R. N. P. C.* (usually annexed as a supplement to 2 D & R.) 8.

(d) 4 Car. & P. 324.

be a complete agreement on the face of it, for it is only offered as evidence that such a transaction existed as the document refers to, and undoubtedly it is evidence of that. But the matter stated on affidavit makes it fit that the case should receive further consideration (a). The rule must therefore be absolute for a new trial; the rule for a nonsuit discharged.

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LITLEDALE J. This case is within the principle of *Leeds v. Lancashire* (b). To be a promissory note, the writing should be one entire instrument. Here the instrument, as to 95*l.*, is not a promissory note but an agreement; therefore the entire instrument is not a promissory note. As to the objection that no consideration appears on the document, that is true, but it supports the averment in the declaration, that the parties came to an account together (which is alleged according to the old mode of declaring upon an account stated); and there can be no doubt that they had come to an account, on which 695*l.* was to be paid to the plaintiff. The statement on the writing itself is evidence that there had been an account.

PATTESON J. *Leeds v. Lancashire* (b) and *Bolton v. Dugdale* (c), are not directly in point. In the first case the instrument was a complete note on the face of it, but qualified by the indorsement. The second was decided chiefly on the ground that the sum to be paid was uncertain, and therefore the instrument could not be a note. It is not necessary to determine whether there

(a) The further observations on this part of the case are omitted.

(b) 2 *Camp.* 205.

(c) 4 *B. & Ad.* 619.

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can be on the same paper a note and an agreement. Here the effect of the writing was, "I promise to pay 600*l.* by instalments, and I agree to set off 95*l.*" That was an agreement to pay 695*l.* in the whole, by the means stated. The 95*l.* was not to be paid to *Davies*, and could not be payable to his indorsee: the instrument, therefore, was not a promissory note.

COLERIDGE J. We should be unwilling to require that two stamps should be affixed to one instrument, though, in a case like that suggested by my brother *Patteson*, it might be necessary. But, if an instrument be in its nature entire, the stamp ought to be such as will apply to the whole; and if, as a whole, it cannot be a promissory note, the question must be, whether it is not good as an agreement. Here I think the document was so, not being one of those in which a statement of the consideration is requisite by the Statute of Frauds. It was, therefore, properly stamped.

Rule absolute for a new trial.

Thursday,
May 2d.

PHILLIPS *against* COLE.

Assumpsit by indorsee of a note against maker. Plea, that the note was made without consideration, and indorsed and delivered to *W.* for the purpose only of its being discounted; that *W.* in fraud of defendant, and without his consent, indorsed the same and delivered it to plaintiff, who gave no consideration, and knew of the want of authority. Replication, *de injuria*.

Held, that evidence of declarations made by *W.* was not admissible to prove the fraud; *W.* being alive and not called, and no proof having been previously given of any connection between *W.* and the plaintiff, or that the plaintiff took the bill under circumstances establishing a privity in point of law between him and *W.*

there

there was no consideration for defendant's making or indorsing the note; that he indorsed it in blank and delivered it to one *Williams*, for a special purpose only; viz. to get it discounted for defendant and pay him the proceeds, and *Williams* received it for that purpose, but did not get it discounted for defendant, and, while he had it for the purpose aforesaid, fraudulently and without defendant's knowledge or consent, and with intent to defraud him, procured the same to be indorsed with the name of *Alves* (a), and then delivered the same, so indorsed, to plaintiff, who gave no consideration, and well knew that *Williams* had no authority to part with the same in manner aforesaid and that there was no consideration for the making or indorsing as aforesaid; further averment, that *Alves* gave no consideration or value for his becoming party to the note, but the same was indorsed to him fraudulently and colourably; notice thereof to plaintiff. Verification. Replication, de injuriâ. Issue thereon.

On the trial before *Littledale J.*, at the sittings in *Middlesex*, after *Trinity* term, 1837, it was proposed on behalf of the defendant to prove declarations of *Alves* in letters said to have been written by him while he was holder of the note. At the time of offering this evidence no proof had been given of any connection between *Alves* and the plaintiff, or of the plaintiff having taken the note when overdue, or without consideration. The evidence was objected to, on the authority of *Barrough v. White* (b), and rejected; and the plaintiff had a verdict. In *Michaelmas* term, 1837, a rule nisi was ob-

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(a) The fact appears to have been that *Alves* and *Williams* were the same person.

(b) 4 B. & C. 325.

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tained for a new trial, on account of the rejection of evidence. In this term (a),

Jervis and *Hoggins* shewed cause. It is not easy to reconcile all the cases. *Barough v. White* (b), the only one solemnly decided, is a direct authority against the reception of this evidence. The established principle appears to be, that a party who has taken a note or bill before it became due, cannot be affected by declarations of a former holder, because he derives his title from the nature of the instrument itself, and not through such previous holder; but that if he has taken the instrument after it became due, he holds it subject to all previous infirmities, and the declarations of a party who held before him may be received against him, as shewing that such party had a defective title. The decision at *Nisi Prius*, in *Smith v. De Wruitz* (c), was consistent with this doctrine. In *Pocock v. Billing* (d) it seems to have been allowed that declarations by a former holder may be received, if made while the instrument was in his possession, because they are then against his interest; but the grounds of decision are not clearly ascertainable from the report, and in *Barough v. White* (b) that case was not treated as a very binding authority. (*Jervis* here read the judgments of *Bayley*, *Littledale*, and *Abbott* Js. in *Barough v. White* (b).) [*Coleridge* J. *Parke* J. observes on that case, in *Woolway v. Rowe* (e), that "the then holder had" there "a

(a) May 2d. Before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

(b) 4 B. & C. 325.

(d) 2 Bing. 269.

(c) Ry. & M. 212.

(e) 1 A. & E. 114. See p. 116.

better

better title than the party whose declarations were referred to," and that "the right of a person holding by a good title is not to be cut down by the acknowledgment of a former holder that he had no title."] *Peckham v. Potter (a)* may be referred to on the other side; there the defendant, who was acceptor, was permitted to give in evidence declarations of the drawer; but that was to shew a fraud in which the drawer and the plaintiff, who sued as indorsee, were joint conspirators: and in *Hedger v. Horton (b)*, where that circumstance did not appear, such evidence was rejected. The rule is, that to render declarations of living persons admissible, the person making them must be identified in interest with the party against whom they are to be proved; *Duckham v. Wallis (c)*, *Beauchamp v. Parry (d)*, *Welstead v. Levy (e)*. The case of *Clipsam v. O'Brien (g)*, which is to a contrary effect, would have been differently decided at a later period. Here no evidence was given which could identify *Alves* with the plaintiff.

Humfrey, *contra*. The declarations were offered to shew that the note was passed to the plaintiff not merely without consideration, but fraudulently. [*Coleridge J.* You offer to shew by the declarations that which is necessary to make the declarations evidence.] There is a difference between cases where the bill or note was merely obtained in the first instance without consideration, and cases where a suspicion arises that it was so obtained by fraud. In the former case actual proof of the absence of consideration between the original parties

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(a) 1 Car. & P. 232.

(b) 3 Car. & P. 179.

(c) 5 Esp. 251.

(d) 1 B. & Ad. 89.

(e) 1 M. & Rob. 138.

(g) 1 Esp. 10.

would

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would not of itself oblige a subsequent holder to prove consideration; in the latter, he must prove it: *Mills v. Barber* (a). In the present case, therefore, the object with which the evidence was offered is material. In *Barrough v. White* (b) the evidence, if received, would only have shewn want of consideration between the maker and payee of the note. In *Peckham v. Potter* (c) it was held that the drawer's acknowledgment of fraud might be given in evidence by the acceptor against the indorsee, though Lord *Gifford* added, "the defendant must prove that the plaintiff is in some way privy to the fraud." So here, the evidence was admissible, though not of itself decisive. It would have been a material step in the proof. And the declarations of any person, while holder, are evidence if they impeach the security, because they are against the speaker's interest. [*Coleridge J.* That would let in declarations shewing want of consideration.] In *Shaw v. Broom* (d) it was held, that in an action between indorsee and acceptor, declarations of the drawer, after parting with the bill (for value), were not admissible to shew want of consideration: but there it was evidently assumed that, if made while he held the bill, they would have been receivable (e). The suggestion that the holder of a bill

(a) 1 M. & W. 425.

(b) 4 B. & C. 325.

(c) 1 Car. & P. 232.

(d) 4 Dowl. & R. 730.

(e) In answer to a question from *Coleridge J.*, whether, in that case, any privity was established between the plaintiff and the former holder, *Humfrey* read the report, by which it appears that the bill was not due when indorsed to the plaintiff; and that after the evidence in question had been admitted, the former holder was called, and stated that no consideration passed between himself and either the plaintiff or the defendant. In *Benson v. Marshal* there cited (p. 731.), where the declaration of a former holder was admitted, the bill was over-due when indorsed to the plaintiff.

does

does not derive his title from the indorser can only shew, if entitled to weight, that, where a suspicion of fraud is raised, the case is taken out of ordinary rules; for it is now clearly settled that if the instrument be tainted with fraud, though in a prior holder, the plaintiff who sues upon it must prove consideration; *Mills v. Barber (a)*.

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Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day of the term, *May 8th*, delivered the judgment of the Court.

The question in this case arose upon the rejection of certain letters written by one *Alves*, a prior indorser of the note sued on, such letters being alleged to have been written by him while holder. (His Lordship then stated the substance of the plea, set out pp. 106, 107. *anté.*)

It was argued that the letters were admissible on two grounds: first as declarations made not only against the interest, but in acknowledgment of the fraud, of the party making them; and, secondly, as made by one under whom the plaintiff, being a subsequent holder, claimed.

With regard to the first of these, it is clear that declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interests of other persons, *merely* because they are against the interest of those who make them. The general rule of law, that the living witness is to be examined on oath, is not subject to any exception so wide; and we are of opinion that the circumstance of fraud being acknowledged introduces no difference in

(a) 1 *M. & W.* 425. *S. C.* 2 *Gale's Exch. Rep.* 5.

principle;

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principle; that acknowledgment would certainly make the evidence, if receivable, more weighty, but only upon the ground that it is more strongly against the interest of the party than any merely pecuniary consideration could make it. The ground of its admission would be the same in either case; and the same objection applies in both, the want of community of interest.

The second ground, if it could have been established in fact, would have made the letters admissible; but, when they were tendered, no evidence had been offered which either directly or indirectly connected the plaintiff with *Alves*. On the evidence the plaintiff did not claim under *Alves*; he had a title of his own as indorsee, and might have an indefeasibly good title, though *Alves* had none at all. Nothing like want of consideration, or the having taken the note over-due, was shewn. Under these circumstances we hardly want an authority for holding that the plaintiff's title is not to be affected by the declarations of *Alves*, who might have been called; but *Barough v. While* (a) and *Beauchamp v. Parry* (b), are, among others, in point.

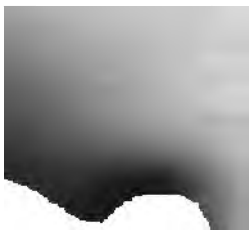
It was said that the letters themselves would have disclosed fraud, and brought the plaintiff into privity with the writer, but whatever is a preliminary necessary to the admissibility of evidence must be proved aliunde before such evidence is admitted.

The letters were therefore rightly rejected, and the rule for a new trial must be discharged.

Rule discharged.

(a) 4 B. & C. 325.

(b) 1 B. & Ad. 89.



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PHELPS and Others *against* LYLE.Friday,
May 3d.

ASSUMPSIT by four persons on a bargain and sale of a steam engine to defendant. Averment, that plaintiffs were ready and willing to deliver, but defendant refused to accept it. Pleas, 1. Non assumpsit. 2. Denial of the bargain and sale. 3. Denial that plaintiff was ready and willing, &c. 4. That defendant did not refuse to accept, but that plaintiffs refused to deliver, or to permit defendant to take it away: verification. Replication to the last plea, *de injuriâ*, generally.

On the trial before Lord *Denman* C. J., at the sittings in *London* after *Trinity* term, 1837, it appeared that the plaintiffs were directors of a joint stock company, called the *London United Mine Company*, consisting of several shareholders besides the plaintiffs, and formed under a deed of settlement, which was not produced. It was shewn that a person named *Chance*, not joined as co-plaintiff, had been a director seven years before the contract declared on and action brought; that he then became bankrupt, and had ever since declined and ceased to act or attend boards as director, but was still alive, and held shares. Two other directors were dead. The entire number had been seven. A correspondence between defendant and the secretary of the company was put in, to prove a contract with the directors, in which the secretary sometimes spoke in the name of the directors, and sometimes of the company generally. On the defendant's part it was objected that the letters shewed no binding contract, but only proposals

The directors of a private company, formed under a deed of settlement, sued upon a contract made with themselves as directors. On the trial it appeared that there was another director, not named as plaintiff, who had become bankrupt, and had ceased and declined to act, or attend the board of directors, when the contract was made.

Held (on non assumpsit), that the plaintiffs ought to have produced the deed to shew that they had authority, in the character of directors, to sue for the company; and also to shew that the office of director was determined by bankruptcy, or by voluntarily ceasing to act.

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and negotiation; that the Statute of Frauds was not satisfied; that the contract, if any, was with the company, and, consequently, that all the shareholders should be joined as plaintiffs; that if the contract was with the directors, *Chance* should have been joined as plaintiff, or his non-joinder accounted for; and that the deed of settlement ought to have been produced. The jury found a verdict for the plaintiff, leave being reserved to move to enter a nonsuit on the above points.

In *Michaelmas* term following a rule nisi was obtained accordingly upon the effect of the correspondence, and on the ground that the plaintiffs were not the proper parties to sue.

Sir *F. Pollock* and *Swann* now shewed cause. Whether the plaintiffs are the proper parties to sue depends on the question of fact, with whom the defendant contracted? *Chance* never acted as director at the time of the contract, it is impossible, therefore, to suppose that any contract was made with him. If there was a doubt, it ought to have been left to the jury to say whether *Chance* was or was not a director at the time of the correspondence. If the assignees of a bankrupt contract through their solicitor during the absence of one of them, who has never acted and has been many years abroad, it is clear that they, and not the absent person who was no party to the contract, should sue and be sued on it. Those who contract with a fluctuating body, and in general terms, must be taken to be dealing with the persons who actually constitute the body and have not voluntarily receded from it: *Metcalf v. Bruin* (a). It is said the deed of settlement should be

(a) 12 *East*, 400.

produced :

produced; but the cause of action is independent of it. It is enough to shew that the bargain was made with the then directors, and that the plaintiffs were then acting as such. If the action were on an implied contract, it might be otherwise. [The argument on the other points is omitted.]

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Sir J. Campbell, Attorney-General, and Butt, contra. If the contract was with the directors, they should have all joined in the action, for the action must be by the parties actually contracting, or those really interested. *Skinner v. Stocks* (a). It was not proved that Chance had ceased to be a director: mere bankruptcy and non-attendance would not discharge him, unless there was a provision to that effect in the deed, which was not produced. Bankruptcy would only divest him of a beneficial interest; and absence from the board only proves a neglect of duty. The contract was not between defendant and certain named persons, A., B., C., in which case they alone might have sued, but between him and the "directors" generally, whom the secretary represented. It is said the evidence should have been left to the jury; but this was not requested on the trial, where the question was treated by both sides as matter of law. Then, if there was any special provision authorising the directors to contract and sue in trust for the company, the deed of settlement should have been produced. *Dickinson v. Valpy* (b) and *Bramah v. Roberts* (c) shew that special powers must be proved by the original deed from which they are derived.

(a) 4 B. & Ald. 437.

(b) 10 B. & C. 128.

(c) 3 New Ca. 963.

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LORD DENMAN C. J. This is an action by four of the directors of a private company for not accepting goods sold by them to the defendant. The correspondence adduced in evidence tends rather to prove a contract with the company than with the directors, but this is a point which we need not consider. It is clear that the plaintiffs, whose right of action, if any, depends on the fact of their being the directors, must prove themselves to be such, and if a party who was a director has been omitted, the plaintiffs must shew that his character of director has been legally determined. For this purpose they ought to have produced the deed.

LITLEDALE J. The company may authorise certain persons to act for them, and to sue alone upon contracts expressly entered into with them. Such persons would be called directors. Are the plaintiffs such directors, and have they power to sue on behalf of the company? This cannot be satisfactorily shewn without producing the deed. As to *Chance*, he appears to be still interested as a shareholder; neither his bankruptcy nor his non-attendance necessarily put an end to his character of director, unless it be so provided by the settlement deed, which was not in evidence.

PATTESON J. I give no opinion on the question, whether the contract here was with the directors or the company, but assume that it was with the former. Of these there were seven. Two are dead. Another is still living. It lies on the plaintiffs to prove that he has ceased to be a director, and by what circumstances. Absenting himself from the board does not, in point of law,

Law, make him cease to be one. His omission to do
duty is no proof that he has none to perform.

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COLERIDGE J. The directors are not those only who
happen to attend a board, or to meet on a particular
day, but those who are directors by the provisions of the
deed of settlement. The plaintiffs, therefore, ought to
have shewn themselves to be the proper parties to sue
by producing it.

Rule absolute for entering a nonsuit.

DE GONDOUN *against* LEWIS and Another.

Saturday,
 May 4th.

TRESPASS by an infant (who sued by *G. Humbert*
 as prochein amy) for taking and detaining a port-
 folio and drawings. Plea, Not guilty.

In trespass for
 taking a port-
 folio and draw-
 ings, the de-
 fendant, an
 officer of the
 customs, may
 justify the
 seizure by
 shewing that
 the portfolio
 contained
 drawings liable
 to seizure for
 non-payment of
 duty, which the
 plaintiff was in
 the act of carry-
 ing ashore out
 of a foreign
 packet; though
 the seizure was
 in fact made
 not as on a for-
 feiture, but

On the trial before Lord *Denman* C. J., at the *Lewes*
 summer assizes, 1837, it appeared that the plaintiff was
 a *French* boy who had arrived at *Brighton* by a packet
 at a late hour of the evening in the month of *September*.
 The defendants, who were officers of the customs, re-
 quired that all luggage, except night-things, should be
 left on board for examination on the following morn-
 ing. The plaintiff was in the act of passing from the
 boat to the pier by a plank or platform with a portfolio
 containing some drawings, when defendants forcibly took

for the purpose of examination; and though the articles seized were in fact returned after
 being examined; and no demand of them had been made before the seizure.

Seem, that if the plaintiff had sued for the assault, the defendant could not have jus-
 tified without shewing either a previous demand or some circumstance to warrant the
 use of force in the first instance.

Notice of action (under stat. 3 & 4 *W.* 4. c. 53. s. 103.) by an infant to an officer of the
 customs, may be given by his prochein amy, although he may not be the prochein amy on
 the record.

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 —
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it from him. It was not proved that defendants had first asked him to deliver it up. Early on the following morning it was examined and returned to plaintiff by one of the defendants, who said "it was all right." The notice of action was in the following form, "To Mr. Comptroller *Lewis*," &c. — "You having wrongfully seized and taken from the person of *Adolphe de Gondouin* of" &c. "his portfolio, containing drawings, the performance of his own hand, and not contraband or seizable" &c. "I do, therefore, give you and each of you notice that I shall, at or after the expiration of one calendar month from the service of this notice, cause a writ of summons to be sued out of the court of King's Bench against you, and each of you, at the suit of the said *A. de Gondouin* for the said trespasses, and proceed thereupon." Dated &c. Signed "Yours &c. *Augustus Pitcher*, No. 88," &c. "acting on behalf and as the prochein friend of the said *A. de Gondouin*, an infant of the age of ten years." *Pitcher*, who signed the notice, was the attorney whose name was indorsed on the writ as attorney of the prochein amy on the record.

At the trial it was objected, 1. that the notice was insufficient; but the objection was over-ruled, with leave to mention it to the Court above, if necessary: 2. that the defendants had a right to detain the goods for examination at a convenient time; 3 & 4 *W. 4. c. 52. ss. 2, 14, 56, & 57.*; and that, as the goods were admitted to be drawings, which are liable to a duty by 3 & 4 *W. 4. c. 56.*, and were illegally unshipped, they were forfeited, and might be seized accordingly; 3 & 4 *W. 4. c. 53. ss. 15, 28, 32.* The Lord Chief Justice was of opinion that a defence was made out, but directed the jury to find such damages as they thought fit on the supposition

Position of the seizure being illegal. The jury found one farthing damages; whereupon the plaintiff was consulted, with liberty to move to enter a verdict for that amount. *Wallinger*, in the following term, obtained a rule nisi accordingly.

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Sir *J. Campbell*, Attorney-General, and *Spankie* Serjt. now shewed cause. The notice was insufficient. Stat. 3 & 4 W. 4. c. 53. s. 103. requires notice of action "by the attorney or agent of the party." *Pitcher* was prochein amy, and not attorney, of the plaintiff; and though it will be said that an infant cannot appoint an attorney, yet his prochein amy can. Independently of the notice, the drawings had been actually taken out of the boat without paying or securing the duty; this occasions a forfeiture of the drawings and of the portfolio containing them, by 3 & 4 W. 4. c. 53. s. 28. Then, all goods liable to forfeiture may be seized in any place by an officer of the customs, by sect. 32 of the same act.

Wallinger, *contra*, was stopped, upon the point of notice, *The Court* expressing a clear opinion that a prochein amy was a sufficient attorney, or at all events, an "agent" for the purpose of giving the notice. As to the merits, the drawings may possibly have been articles exempted from duty; at all events they were not taken as forfeited. The return of them to the plaintiff shews there was no intention to seize on that ground. If the plea had been special, the plaintiff might have newly assigned that they were seized for another and different purpose, and not as forfeited. Even if forfeited, they ought to have been demanded before seizure. It is questionable whether the defendants ought to have

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forcibly taken them from the person at all: a seizure under such circumstances is against common right, as appears by the rule against taking, under a distress or execution, an article in use, or on the person: *Storey v. Robinson* (a), *Sunbolfe v. Alford* (b). It is a breach of the peace. [Lord DENMAN C. J. That is not your complaint here. Coleridge J. If personal custody is to protect forfeited goods, the revenue laws cannot be enforced. If there was personal violence, the plaintiff has not brought his action for it; and, as for the goods, they, being forfeited, were no longer his.] It was not shewn upon the trial that the goods were actually forfeited. [Patteson J. Sect. 32 authorises seizure of goods "liable to forfeiture."]

LORD DENMAN C. J. If the plaintiff had sued in trespass for an assault, the evidence would not have amounted to a justification; for I do not think an officer can forcibly take goods from the person without a previous demand, unless, indeed, there be fraud, or something to justify the use of force in the first instance. But here the action is in respect of the goods, which were undoubtedly liable to seizure. *Storey v. Robinson* (a) was an action for an assault, and is therefore inapplicable.

LITLEDALE J. The goods were actually unshipped, and being liable to a duty, and, therefore, to forfeiture for non-payment of it, were justly seized by the defendants.

(a) 6 T. R. 138.

(b) 3 M. & W. 248.

PATTESON J. If a demand had been required as a condition precedent to seizure, the defendants could not have justified; but there is no such requisition. The goods, therefore, were liable to seizure; and as for any unlawful violence in the act of taking, the plaintiff has not made that the subject of his action.

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COLERIDGE J. concurred.

Rule discharged.

DOWN against **HATCHER** and **CHARLOTTE**, his Wife, Executrix of **ROGERS**. *Saturday, May 4th.*

INDEBITATUS assumpsit for 300*l.* for the use and occupation of a dairy farm by *Rogers*, the testator. 2*d* count, for 100*l.* for agistment of testator's cattle. 3*d* count, for 100*l.* for money due on an account stated between plaintiff and testator. Breach, that although the plaintiff had received 158*l.* 5*s.* 8*d.* on account of the said several sums, "yet the residue thereof, to wit, the sum of 500*l.* remained unpaid" &c., to the plaintiff's damage of 200*l.* Plea, as to the said residue of the said sums, that after the promise and before action, defendant *Charlotte*, as such executrix, paid plaintiff 6*l.* 10*s.* in full satisfaction and discharge of the said residue, and of all causes of action in respect thereof; and that plaintiff accepted and received the said 6*l.* 10*s.* in such full satisfaction and discharge as aforesaid. Verification. Replication, that defendant, *Charlotte*, as such executrix, did not pay plaintiff the said sum, modo et formâ. Con-
joined, the jury found for defendant.
Held, that the plea, alleging the acceptance of a less in satisfaction of a larger sum, was bad after verdict; and that plaintiff was entitled to judgment non obstante veredicto.

clusion

1839. clusion to the country. The particular of demand was
 —————
 Down for 240*l.* for the rent of a dairy of twenty-four cows,
 against and gave credit for 158*l.* 5*s.* 8*d.*, leaving the difference
 HATCHER. (81*l.* 14*s.* 4*d.*) as the sum sought to be recovered. At
 the trial before *Patteson J.* at the summer assizes at
 Bridgwater, 1837, the defendants obtained a verdict.
 In the following term, *Barstow* obtained a rule nisi for
 judgment non obstante veredicto, or for a new trial
 on the ground of a perverse verdict.

Rogers and *Fitzherbert* now shewed cause (a). The question is, whether this plea of payment is bad after verdict. The damages sought to be recovered by the declaration are limited to 200*l.*; and the sum of 6*l.* 10*s.* is pleaded as accepted in satisfaction. This would perhaps be bad on demurrer, on the ground that a less sum can be no satisfaction of a greater; *Cumber v. Wane* (b), *Fitch v. Sutton* (c), *Thomas v. Heathorn* (d); but if there be any circumstances under which a less sum may be a legal satisfaction of a greater, the Court will presume after verdict that such was the case here. *Wilkinson v. Byers* (e) shews that payment of the same, or a less sum than the sum demanded, may be a good consideration for a promise to stay proceedings; as where the debt is unliquidated, and the Court would interfere to stay an action continued after such payment, and acceptance. If so, it seems to follow that such payment, if pleaded, would be an answer to the action. *Parke J.* there says,

(a) Before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge Js.*

(b) 1 *Str.* 426.

(c) 5 *East*, 230.

(d) 2 *B. & C.* 477. *Smith's Leading Cases*, vol. i. p. 147, note to *Cumber v. Wane*, was also cited.

(e) 1 *A. & E.* 106.; and see *Reynolds v. Pinhowe*, *Cro. Eliz.* 429. there cited.

expressly,

expressly, that payment of a less sum than the demand is a satisfaction, where the debt is unliquidated. Here the action is for unliquidated damages; and although the plaintiff necessarily specifies the sum at which he estimates his damage, that amount is not material. In *Jourdain v. Johnson* (a), a plea of payment into court of a less sum seems not to have been considered bad by the Court on that ground, but because it treated several counts as one. A distinction is there made between debt and assumpsit. *Wright v. Acres* (b) is strongly in favour of the plea. There a plea of payment of 10*l.* in satisfaction of the promises and damages, pleaded to a declaration of indebitatus assumpsit containing two counts for 10*l.* each, and laying the damages at 20*l.*, was held good after verdict; and though it is true that a nolle prosequi as to one count had narrowed the issue, yet it does not appear that the decision of the Court depended altogether upon that fact (c). *Mee v. Tomlinson* (d) was decided on special demurrer.

Barstow, contra. Though there may be no case in which a similar plea has been decided to be bad after verdict, yet, as this is admitted to be bad on general demurrer, and there is nothing in the verdict that can cure the defect, it must be taken to be still bad. *Thomas v. Heathorn* (e) shews that the plea is bad in substance, and that if such a transaction can constitute a defence, it should be pleaded according to its legal effect, viz. as a payment of the whole, and a return of part by way of a

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 against
 HATCHER.

(a) 2 C. M. & R. 564.

(b) 6 A. & E. 726.

(c) A report of the same case was read from *Will. Woll. and Dav.* 328., which was more favourable to the defendants.

(d) 4 A. & E. 262.

(e) 2 B. & C. 477.

gift.

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gift. It is true that an agreement to accept part, founded on a sufficient consideration, may be a defence; but the agreement must be pleaded, and cannot be left to presumption or conjecture even after verdict. Serjt. Williams in note (1) to *Stennel v. Hogg* (a), lays down the rule, that where the issue joined necessarily required, at the trial, proof of the facts defectively stated or omitted, there the defect or omission is cured by verdict. But here the only question in issue was, whether 6*l.* 10*s.* was accepted in satisfaction of the residue, which may be quite true, and yet no answer. It is impossible to presume that the jury found payment of enough to cover all the residue mentioned in the declaration; for that was never in issue. [He then offered to take a verdict with nominal damages, if the defendants would consent; upon which the Court suspended their judgment.]

Lord DENMAN C. J., on a subsequent day of the term, (*Wednesday, May 8th*) delivered the judgment of the Court, that the plea was bad after verdict, and that there must be judgment *non obstante veredicto*.

Rule absolute for judgment *non obstante veredicto*.

(a) 1 *Wms. Saund.* 228.

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STRANGE and Others *against* PRICE.Saturday,
May 4th.

ASSUMPSIT by indorsee against indorser of a bill of exchange, drawn 21st October 1836, payable two months after date, accepted by *John Betterton*. Pleas, denying 1. the acceptance; 2. the notice of dishonour. Issue thereon. On the trial before *Patteson J.* at the *Salisbury* summer assizes, 1837, it was proved that the following letter was sent by plaintiffs to defendant on December 29th, 1836.

"Messrs. *Strange* and Co. inform Mr. *James Price* that Mr. *John Betterton's* acceptance, 87*l.* 5*s.* is not paid. As indorser, Mr. *Price* is called upon to pay the money, which will be expected immediately.

"Mr. *James Price*,

"*Fairford.*

"*Swindon, December 1836.*"

A verdict was found for the plaintiffs, with leave to move to enter a nonsuit if the Court should consider the notice insufficient. *Erle*, in the ensuing term, obtained a rule accordingly.

Crowder and *Butt* now shewed cause. The letter was a sufficient notice. *Abbott C. J.* says, in *Hartley v. Case (a)*, "There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Here

"Messrs. *S.* and Co. inform Mr. *P.* that Mr. *B.'s* acceptance, 87*l.* 5*s.* is not paid. As indorser, Mr. *P.* is called upon to pay the money, which will be expected immediately. December 1836."

Held, not sufficient notice to *P.* of dishonour of a bill accepted by *B.*, payable December 24th.

(a) 4 B. & C. 339.

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the letter in question did not convey to the defendant any such notice; it does not even say that the bill was ever accepted." In *Tindal v. Brown* (a), *Ashhurst J.* said, "*Notice* means something more than *knowledge*; because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to *pay*, but that *he* (the holder) *does not intend to give credit*. In the present case there is no notice; for the party ought to know whether the holder intends to give credit to the maker, or whether he intends to resort to the indorser." *Hartley v. Case* (b) introduced a greater precision than was before thought requisite, but the present notice meets every test furnished by either of these cases. The defendant is told that the plaintiffs look to him as indorser, by reason of *Betterton's* acceptance not being paid. *Solarte v. Palmer* (c) seems to lay down a rule of increased strictness: but the terms in which that case was decided have been the subject of much discussion since; and the decision, at all events, is not unfavourable to the present plaintiffs, for there the notice did not even shew that the bill had been accepted. It is true that, in *Boulton v. Welsh* (d), *Tindal C. J.* said, "The rule requires that, either expressly or by necessary inference, the notice shall disclose that the bill or note has been dishonoured." "The two important facts are, that payment of the bill has been demanded of the acceptor, and that payment has not been obtained. In like manner, in the case of a promissory note, the notice should shew a presentment to the maker, a demand of payment,

(a) 1 T. R. 167.

(b) 4 B. & C. 339.

(c) 1 New Ca. 194. S. C. 8 Bligh, N. S. 874. S. C. in Exch. Chasmb. 7 Bing. 530.

(d) 3 New Ca. 688.

and

and refusal. Here, the notice only states that the note became due and was returned unpaid. These facts are compatible with an entire omission to present the note to the maker." But the rule of "necessary inference" was applied too strictly in that case, according to the judgment of the Court of Exchequer in *Hedger v. Steavenson* (a), which agrees with the decision of this court in *Grugeon v. Smith* (b). The last three cases were under the consideration of the Court of Common Pleas in *Houlditch v. Cauty* (c), but the circumstances there rendered it unnecessary for the Court either to reverse or to affirm its former decision. *Parke B.* says, in *Hedger v. Steavenson* (d), "It seems to me enough if it appear by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor, and not paid by him." If that be so, the notice here is clearly sufficient. The word "returned" has been relied upon as having a peculiar mercantile signification, but there is no ground for such an assertion. A particular expression is not essential: any words which convey a distinct idea of the fact are sufficient. [*Littledale J.* The word "returned" would not be proper in many cases; for instance if the party presented the bill himself. *Coleridge J.* The parties very often are not mercantile men; if their understanding is to be a test in any instance, there will be different rules for different cases.] Here any person would understand that the defendant was looked to as indorser in consequence of the bill not being paid at maturity. The notice is very different from those in

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(a) 2 M. & W. 799.

(b) 6 A. & E. 499.

(c) 4 New Ca. 411.

(d) 2 M. & W. 805.

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Hartley v. Case (a) and *Solarte v. Palmer (b)*, which did not even shew that the bill had been accepted. [*Patterson J.* That was not the material point; the ground of decision was that the bill did not appear by the notice to have been dishonoured. In the present case the notice does not shew, by date or otherwise, that the bill is overdue.] That has never been held essential. The fact, that the bill was overdue when the notice was given, would be matter of evidence at the trial. It must be inferred from the notice that the bill had been presented, and it would not have been presented unless due.

Erle, contra. This notice is bad, as not shewing that payment has been demanded and refused. A plaintiff might give such a notice, though he had always kept the bill in his own pocket. *Abbott C. J.*, in *Hartley v. Case (a)*, insists on the necessity of shewing, by the notice, that payment has been refused by the acceptor. The holder must not merely say to his indorser, "I look to you, as indorser, for payment;" he must assert the dishonour of the bill by the primary party. The decision in *Solarte v. Palmer (b)* was the confirmation, by two successive courts of error, of the principle laid down in *Hartley v. Case (a)*. Here the dishonour of the bill does not appear on the notice, either (as *Tindal C. J.* said in *Solarte v. Palmer (c)*), "in express terms or by necessary implication." The principle of the two last-cited cases gave the ground of decision in *Boulton v. Welsh (d)*. The word "returned" was insisted upon there,

(a) 4 B. & C. 339.

(b) 1 New Ca. 194. S. C. 8 Bligh, N.S. 874. S. C. in Erch. Chamb. 7 Bing. 530.

(c) 7 Bing. 533.

(d) 3 New Ca. 688.

but

but without success, as a word of known mercantile signification, and affording a "necessary inference" that the note had been presented and dishonoured. *Hedger v. Steavenson (a)*, *Grugeon v. Smith (b)*, and *Houlditch v. Cobby (c)*, where it was held that sufficient notice had been given, were all different cases from this: in the first two the notices shewed that the note and bill had been noted for non-payment; in the third there was an acknowledgment by the defendant: and the notices in all contained the word "returned," which, as *Parke B.* observed in *Hedger v. Steavenson (a)*, "is almost a technical term in matters of this nature, and means that the bill has come to maturity, has been presented, and has not been paid." It is not necessary to contend that this word is essential in every notice; but some generally known term on such subjects ought to be used; as the word "dishonoured;" *Woodthorpe v. Lawes (d)*.

Lord DENMAN C. J. I have some doubt as to the reasoning on which the decisions in *Hartley v. Case (e)* and in *Solarte v. Palmer (g)* have turned; but the decision in the latter case (as was observed in the Court of Exchequer (*h*)) is binding, and I think it authorises our saying here that the notice is not sufficient. As in *Solarte v. Palmer (g)*, so here, the notice does not convey full information that the bill has been dishonoured.

(a) 2 M. & W. 799.

(b) 6 A. & E. 499.

(c) 4 New Ca. 411.

(d) 2 M. & W. 109.

(e) 4 B. & C. 339.

(g) 1 New Ca. 194. S. C. 8 Bligh, N. S. 874. S. C. in Exch. Chamb. 7 Bing. 530.

(h) See *Hedger v. Steavenson*, 2 M. & W. 805.

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In all the cases where such notices have been held defective, it might have been said that they furnished a reasonable implication of the fact: but clearly that is not sufficient: the notice must be a positive statement that the bill has been accepted and dishonoured. In cases where the strict rule has been thought not applicable, there have been circumstances connected with the notice which shewed that the necessary implication did arise.

LITLEDALE J. To persons in general, perhaps, a notice like this would convey the requisite information; but, if we are to lay down a rule on the subject, we must say that such a notice is insufficient. It is not said that the bill has been dishonoured, or returned; consistently with the language used, it might never have been presented, and have remained unpaid by reason of the holder's laches.

PATTESON J. I thought this case might by possibility be distinguished from *Solarte v. Palmer (a)*, and was anxious that it should be discussed; but no real distinction can be drawn. It is argued that the acceptor's default may be inferred from the defendant being called upon as indorser; but that was suggested also in *Solarte v. Palmer (a)*. Here, as in that case, the notice does not furnish the date of the bill, or the time of its becoming due. I do not say that that is essential; but the notice is at all events open to the objection which prevailed in *Solarte v. Palmer (a)*, that the fact of dishonour is not fully shewn, and we are bound by that decision.

(a) 1 New Ca. 194. S. C. 3 Bligh, N. S. 874. S. C. in Exch. Chamb. 7 Bing. 530.

COLERIDGE J. I also think that we are bound by *Solarte v. Palmer* (a). The cases referred to, in which the notices have been held good, were distinguishable from that, by the word "returned" or "dishonoured," or by a reference to notarial charges. The case in favour of the notice is less strong where only one of these circumstances occurs; but, in all the instances, one at least has been found.

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Rule absolute (b).

(a) 1 New Ca. 194. S. C. 8 Bligh, N. S. 874. S. C. in Exch. Chamb.
7 Bing. 530.

(b) The following case was decided in Trinity term, 1840.

COOKE against FRENCH.

Monday,
May 4th.

THIS was an action by indorsee against drawer of a bill of exchange; plea, no notice of dishonour. On the trial before Williams J. at the sittings in *Middlesex*, in Trinity term 1840, the following notice was proved. "I beg to inform you, that Mr. Duterrau's acceptance for 200*l.*, drawn and indorsed by you, due 31st July, has been presented for payment and returned, and now remains unpaid." The jury, under the learned Judge's direction, found a verdict for the plaintiff. *Selfe*, in the same term, (May 4th), moved (before Lord Denman C. J., Littledale, Patteson, and Coleridge Js.) for a new trial on the ground of misdirection, contending that the notice was bad, because it did not apprise the defendant that he would be held liable. He cited *Burgh v. Legge*, 5 M. & W. 418.

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day of the term, (May 6th) said the Court were of opinion that the notice of dishonour was good.

Rule refused.

The QUEEN against The Poor Law Commissioners.

Monday,
May 6th

In the Matter of The CAMBRIDGE Union.

This case is reported, 9 A. & E. page 103.

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The QUEEN against CROSSLEY and ROBINSON.

An indictment against overseers on sect. 47 of stat. 4 & 5 W. 4. c. 76., for not accounting to the auditor of a union, upon request, on a day appointed by him, is bad, unless it appear that there was some rule, order, or regulation of the commissioners that the overseers should account upon such request.

Where no such order, &c. is alleged, the indictment cannot be sustained after verdict, merely because it appears, by inference, or the inducement, that defendants have not in fact accounted for one whole quarter.

Upon such indictment it is sufficient, at least after verdict, to allege the order to have been made by "the Poor

Law Commissioners for *England and Wales*," without naming each commissioner; and to state that a copy of the order under seal, &c. was "duly sent" to the overseers, without alleging actual service of it on them. Per Lord Denman C. J. and Patteson J.

Quære, Whether disobedience of an order of the commissioners to account be indictable under sect. 98 before the third offence?

INDICTMENT (7th January 1838), on stat. 4 & 5 W. 4. c. 76. s. 47., against overseers for not accounting. The first count recited an order of "the Poor-Law Commissioners for *England and Wales*" forming the township of *Todmorden* and *Walsden*, and other districts, into a union; and that a union and board of guardians were duly formed accordingly. It further stated another order by the same commissioners, that the guardians should appoint an auditor of the union; and that such auditor should, four times in every year, that is to say, within thirty days of each of the following days, viz. *Lady-day*, *Midsummer-day*, *Michaelmas-day*, and *Christmas-day*, audit the accounts of the several parishes &c. comprised in the union, "according to the laws in force for the time being for the administration of the relief of the poor:" that a copy of the last-mentioned order, under seal, &c. was "duly sent" by the said commissioners to the overseers of each parish &c., according to the provisions of the act; that defendants were overseers of the said township of *T.* and *W.*, and that the guardians of the union had duly appointed *J. Gledhill* to be auditor, whereof defendants had notice; that it was the duty of defendants, as such overseers, under and by virtue of the provisions of the act, to make and render an account to the

said

said *J. G.*, as such auditor, when and as often as, the rules, orders, and regulations of the commissioners did direct: that afterwards, on a day within thirty days of *Christmas-day* 1838, viz. on &c., defendants, as such overseers, were required by *J. G.*, as such auditor, to render to him an account at a certain day within such thirty days, to wit on &c., in pursuance of the said act; but that defendants, not regarding &c. did not render such account at the said time at which they were so required. — The 2d and 3d counts were substantially the same. — The 4th count stated that defendants were overseers of the above township; that *J. G.* was auditor of accounts in a union in which the said township was comprised; that defendants were required by *J. G.* to render an account to him on a certain day, viz. on 2d *January* 1838; that defendants had not, at the time of the inquisition, rendered an account to *J. G.* for the then current quarter, and that it was their duty to render such account to him; but that defendants did not render an account to him at the time when they were so required, and “from thence continually hitherto” have neglected to render an account &c. — The 5th count was similar to the 4th. — The 6th count stated that for more than six calendar months before committing the offence thereafter mentioned, and thence continually until the committing &c., *J. G.* was auditor in a certain union in which the above township was comprised; that for more than a quarter of a year preceding that time defendants were overseers thereof, and continued so till the committing &c.; that it was their duty, as such, to render an account to *J. G.*, as such auditor, once at least in every quarter of a year while they continued overseers; that *J. G.* on &c.

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required defendants to render such account on a certain day then to come, to wit on &c.; that defendants had not, at the time of such request, rendered any account to him for the then current quarter, and did not render one to him on the day required, and have thence continually refused to render &c.

On the trial before *Alderson B.* at the last *Liverpool* Spring assizes, a verdict was found for the Crown, subject to a motion to enter a verdict for defendants on the ground that the auditor was not legally appointed.

In this term (18th *April*), *Dundas* moved to enter a verdict for defendants on the above ground, and also to arrest judgment on the following grounds: 1. That no indictment would lie, because the act provides a specific penalty in sect. 95, and the offence was not punishable before; *Rex v. Robinson (a)*. The auditor being a servant of the guardians, the disobedience was of *their* order. 2. That, if indictable, the offence was not properly charged; for that the names of the commissioners should have been stated. That, although sect. 2 gives them an official style, and sect. 3 enables them to use a seal, this does not make them a corporation, nor dispense with the necessity of naming them in an indictment; *Rex v. Sherrington (b)*. There a statute expressly provided that property might, in an indictment, be laid in "the trustees of the poor of" &c., yet it was held necessary to add their names, because they were not incorporated (c). 3. That a copy of the order for the appointment of the auditor was not alleged to have been personally served on each defendant, which was necessary to bring them into con-

(a) 2 Burr. 799.

(b) 1 Leach, C. C. 513.

(c) See *Rex v. Beacall*, *Moody's C. C.* 15.

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tempt; *Rex v. Kingston* (a). The Court granted a rule to shew cause when judgment should be moved for.

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Starkie and *Peel* now shewed cause on moving for judgment (b). As to the objections in arrest of judgment (c): it is said that no indictment lies, because sect. 95 imposes a penalty on overseers for wilfully disobeying the legal and reasonable orders of guardians in carrying the orders of the commissioners into execution. But this is not an offence under that section, nor under sect. 98. The defendants are not charged with disobeying the guardians or commissioners, but the

(a) 8 *East*, 41.

(b) Stat. 4 & 5 W. 4. c. 76. s. 47., upon which the indictment was framed, enacts "That every overseer, treasurer, or other person having the collection, receipt, or distribution of the monies assessed for the relief of the poor in any parish or union, or holding, or accountable for, any balance or sum of money, or any books, deeds, papers, goods, or chattels relating to the relief of the poor, or the collection or distribution of the poor rate of any parish or union, shall once in every quarter, in addition to the annual account now by law required, and where the rules, orders, and regulations of the said commissioners shall have come in force, then as often as the said rules, orders, and regulations shall direct, but not less than once in every quarter, make and render to the guardians, auditors, or such other persons as by virtue of any statute or custom, or of the said rules, orders, or regulations, may be appointed to examine, audit, allow, or disallow such accounts, or, in default of any such guardian, auditor, or other person being so appointed as aforesaid, then to the justices of the peace at their petty sessions for the division in which such parish or union shall be situate, a full and distinct account in writing of all monies, matters, and things committed to their charge, or received, held, or expended by them on behalf of any such parish or union, and, if thereunto required by the justices, guardians, auditors, or other persons authorised in that behalf, shall verify on oath the truth of all such accounts and statements from time to time respectively, or subscribe a declaration to the truth thereof, in manner and under the penalties in this act provided for parties giving false evidence or refusing to give evidence under the provisions of this act;" &c.

(c) The argument on the legality of the appointment of auditor is omitted, the Court having given no opinion on that point.

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peremptory directions of the legislature contained in sect. 47. It is a disobedience of the law, for which the defendants are liable, although pecuniary penalties may be superadded by another and distinct provision of the same act. *Rex. v. Robinson* (a) is an authority for this. *Reg. v. Wyat* (b) shews that neglect of duty by a public officer is indictable *per se* at common law, independently of any order or request. The order here only fixes the time. [Lord Denman C. J. The request is to account on a certain day. The defendants may have done so on the very next day, and yet within the thirty days. *Patteson J.* You do not allege any order of the commissioners to the overseers, requiring them to account to the auditor, nor do you allege it to be a rule of the commissioners that all overseers shall render an account to him at his request.] The last three counts distinctly shew a neglect to account for one quarter, which defendants were, at all events, bound to do. The fourth count states a neglect on the 2d of *January* 1838, and thence till the time of the inquisition, which exceeds a quarter; so that the caption of the indictment shews a breach of duty. [*Littledale J.* That is mere inference. Your charge is the not accounting upon request.] The sixth count shews the neglect more distinctly. It states a neglect to account to the auditor during the current quarter, and a refusal to account on a given day. [*Patteson J.* The neglect to account in the quarter is only alleged by way of inducement.] The point made respecting the proper description of the commissioners, applies only to the first three counts. The whole alle-

(a) 2 Burr. 799. See also *R. v. Harris*, 4 T. R. 205; and n. (4) to *R. v. Dickenson*, 1 Will. Saund. 135 a.

(b) 1 Salk. 380.

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gation is superfluous, or, at most, inducement. It might have been alleged that a union was "duly formed," without naming the commissioners. The description, however, is sufficient. The act gives them a quasi corporate character and a name of office, which is enough in an indictment, at least since stat. 7 G. 4. c. 64. s. 20., which enacts that no judgment shall be stayed for that any person, mentioned in any indictment, is designated by a name of office, instead of his proper name. Another objection is, that a copy of the order should appear to have been served on the defendants. It is, however, alleged to have been duly sent to them, which is all that sect. 18 requires the commissioners to do; and it is further stated that the defendants had notice of the due appointment of *Gledhill*.

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LORD DENMAN C. J. The indictment cannot be sustained. An indictment for not accounting once in a quarter would, perhaps, have been good without alleging any order at all; but the offence charged in this indictment is that of refusing to account upon the request of the auditor. This is no offence independently of some specific rule, order, or regulation of the commissioners calling on the defendants to do so, which is not alleged. The other objections are not, in my opinion, of any weight.

LITLEDALE J. The defendants might have been indicted in two ways; for not accounting once in every quarter; or for not accounting as often as the rules, orders, and regulations of the commissioners did direct. This is in substance an indictment for not accounting upon the request of the auditor, which is no offence

1839. offence within sect. 47, unless it appear that there was an order to that effect by the commissioners.

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PATTESON J. The indictment is evidently founded on that part of sect. 47 which requires overseers to account at such times as the commissioners shall by their orders and rules direct. Now there is no averment of any order by them to account at a certain time, or, indeed, of any order by them to account at all. This vice runs through every count. There is no count for refusing to account once in the quarter, or even to account within thirty days, but merely for not accounting on request. Whether disobedience of an order of the commissioners within sect. 98 be indictable till the third offence, is a point which is not raised. With regard to the other objections, I agree with my Lord.

COLERIDGE J. concurred.

Rule absolute to arrest judgment.

Tuesday,
May 7th.

The QUEEN *against* The Commissioners of the Navigation of the Rivers THAMES and ISIS.

This case is reported, 8 *A. & E.* p. 901. note (b).

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PRICE *against* POPKIN.*Tuesday,
May 7th.*

COVENANT by lessee against landlord for not repairing the demised premises. There were several pleas on which issues were joined; but, before trial, a Judge's order was obtained, whereby "the cause and all matters in difference between the parties thereto" were referred to arbitration, the costs of the suit to abide the event, and the costs of the reference to be in the discretion of the arbitrator.

The award directed a verdict to be entered for the plaintiff on all the issues, and ordered payment of damages in respect of the breaches of covenant. It further recited that "the parties, among other matters in difference, had referred to the arbitrator to say and adjudge whether certain grates, locks, bolts, and fastenings were part and parcel of the demised premises in the declaration named, and further to order and adjudge what should be done to make a final end and determination of such matters in difference," and then proceeded to find and adjudge "that the said grates, locks, bolts, and fastenings were part of the demise of the defendant to the plaintiff, and were removed and carried away by the defendant from the dwelling-house named in the declaration, and applied to his own use, and that such fixtures were of the value of 11*l.* 5*s.*" It then ordered the plaintiff "to fix and set up other grates, locks, bolts, and fastenings in the place and stead of such as were removed as aforesaid, and to leave the same to

On submission of a cause and all matters in difference between lessor and lessee, the costs to abide the event, an award that certain fixtures have been wrongfully removed by lessor, to the value of 11*l.*, and that lessee shall set up others in their place, to be left for lessor at the end of his term, and that lessor shall pay lessee 11*l.* on a specified day, is bad for want of authority, though the removal of such fixtures was in fact a matter in difference on the arbitration.

Held, also, that such award was uncertain, in not specifying the value, quality, or description of fixtures to be set up by the lessee, and might be set aside by the lessor.

An untrue recital, in an award, of an extension of the arbitrator's power by agree-

ment of the parties, will not cure an excess where the truth appears upon affidavit.

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and for the use of the defendant at the end of the term named in the declaration ;” and further directed payment of the said sum of 11*l.* 5*s.*, and of the damages assessed on the breaches, by the defendant to the plaintiff, on a specified day.

In *Hilary* term last, a rule nisi was obtained on behalf of the defendant to set aside the award, on the grounds, 1. that the arbitrator had no power to direct a verdict to be entered ; 2. that the award was bad for uncertainty, in not stating the price, number, quality, description, or value of the grates, &c. to be set up, or in any way ascertaining the same ; 3. that the arbitrator had no authority to direct the plaintiff to set up the grates, &c. as directed in the award ; 4. that the award, as to the grates &c., did not pursue the terms of the submission as recited in the award, inasmuch as the question, as there recited, was, whether the grates, &c. were parcel of the demised premises, and the award determined another question, namely, that they had been removed and converted by the defendant.

The affidavit by defendant and his attorney, on which the rule was obtained, stated that a claim had been made by the plaintiff on the reference for damages for divers grates, locks, bolts, and fastenings alleged to have been removed by the defendant from the premises, but that the defendant “did not in any way agree to refer it to the arbitrator to order what should be done to make a final end and determination of such claim,” and that “there was no new, or special, reference of the said claim, other than the said Judge’s order.”

Several affidavits in answer stated, among other things, that at the time of the reference there were several matters in difference, and that one of them
“ related

"related to certain grates, locks, bolts, and fastenings, alleged to have been removed by the defendant from the dwelling-house, after the demise thereof by him to the plaintiff;" that, during the progress of the reference, it was agreed between the attorneys of the parties to refer to the arbitrator other matters in difference, "including the said question as to the said grates," &c. and the counsel who attended on behalf of the defendant did accordingly contend before the arbitrator that the said grates, &c. were not parcel of the demise. A further affidavit, by an ironmonger, stated that he had been employed by plaintiff after the award to ascertain what grates, locks, bolts, and fastenings were required to be set up in lieu and stead of those which had been removed; that he had ascertained without difficulty, by the marks, from what places they had been removed, and had supplied others "such as were fit, proper, and suitable for the said house, and such as were usually set up and used in similar houses," and that the same were afterwards set up by the plaintiff in the place and stead of those which had been removed; and that "there was no difficulty in ascertaining either the price, number, quality, description, or value of such grates, &c., or in what places the same were to be set up."

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W. H. Watson shewed cause. It must be admitted that the award of a verdict cannot stand, there having been no verdict of a jury taken, nor any power to enter one by the order of reference. (a) But this may be struck out without affecting the rest of the award; for, as there is a finding and award of damages

(a) *Donlan v. Brett*, 2 A. & E. 344.; *Hayward v. Phillips*, 6 A. & E. 119.

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on each issue, there is a sufficient "event" for the purpose of shewing on whom the costs of the action are to fall. As to the objection of uncertainty, the award, in directing fixtures to be placed instead of those taken away, must be intended to mean that reasonably good ones must be placed where the former ones stood. It is impossible to be more particular as to value or kind, nor is it required in similar cases. Thus an award that a party shall do repairs is usual, and sufficiently certain. Mere uncertainty as to the value or amount is not enough to make the award bad, if these can readily be reduced to a certainty; *Beale v. Beale* (a); *Hanson v. Liversedge* (b); nor does it appear that there was here any difficulty or dispute on this point; indeed, the contrary is shewn by one of the plaintiff's affidavits, and, in fact, the plaintiff has proceeded to replace the fixtures in pursuance of the award. *Cargey v. Aitcheson* (c), *Wohleberg v. Lageman* (d) are in favour of the award. As to the supposed excess of authority in awarding that the plaintiff shall replace the fixtures, the submission was of all matters in difference; and, notwithstanding the discrepancy in the affidavits, it is sufficiently clear that the question was discussed before the arbitrator. It is found that the fixtures were included in the demise, that they had been removed, and were worth a certain sum, which the defendant is directed to pay. The further direction to replace them at the plaintiff's expense is in favour of the defendant, to whom they will hereafter belong, so that he has no reason to complain.

(a) 1 *Rol. Ab.* 251., *Arbitrement* (H) pl. 14. *S. C. Cro. Car.* 383.(b) 2 *Ventr.* 242.(c) 2 *B. & C.* 170.(d) 6 *Taunt.* 254.

Crowder,

Crowder, *contra*. If the verdict be struck out, there will be no sufficient finding to enable the parties to see who is to pay costs. There is excess of authority; for the order of reference contains nothing that can give the referee power to order what is to be done by either of the parties. If the removal of the fixtures was a matter in difference, the arbitrator had only power to award damages to the plaintiff, as if he had brought an action. But here, coupling the recital in the award with the affidavits, there was at most only a reference of the question, whether certain fixtures were part of the demised premises; and if the award makes an untrue recital, extending the power further to order "what shall be done," this will not bind the Court, when the contrary appears by the affidavits of the plaintiff himself. [Lord *Denman* C. J. assented.] The arbitrator awards that the fixtures shall be replaced by the plaintiff. [*Patteson* J. If the award would be good without that direction, is not the excess of authority rather for your advantage?] The plaintiff is not bound to replace them with others of equal value, so that, at the end of the term, when the plaintiff is to deliver them up to the defendant, the defendant may find himself in possession of articles of much less value than those which he is said to have demised. This uncertainty is another objection; the award not shewing what fixtures had been removed, nor what locks and grates the plaintiff was to substitute. *Pope v. Brett* (a). [*Litledale* J. It may perhaps be intended to mean locks and grates of the same kind as those which were removed.] The words of the award would be satisfied

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(a) 2 *Saund.* 292.

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by articles of a very different quality. It has been held that an award to pay "so much as the land is worth" would be bad (a), although its value might, perhaps, have been easily ascertained. That the plaintiff has, in fact, replaced these articles since the award, is a matter which can have no effect on the decision of the Court. The plaintiff's affidavit only states that it was easy to ascertain where the old fixtures had been, and what was the price, number, quality, &c. of those which had been set up in their stead. The objection vitiates the whole award, for it can stand only if it be good as to every part referred, and the reference of which formed the consideration for the submission.

LORD DENMAN C. J. I regret to find myself obliged to decide that this award is bad. The arbitrator had no authority to order any thing to be done with respect to the fixtures; and, if he had such authority, he has given his directions in too uncertain a manner. The award must be set aside, not as to part only, but as to the whole.

LITLEDALE, PATTESON, and COLERIDGE, Js, concurred.

Rule absolute.

(a) See *Titus v. Perkins, Skinn.* 247, 248.

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STALEY *against* FRANCIS BEDWELL.Wednesday,
May 8th.

ON the execution of a fi. fa. at the plaintiff's suit against the defendant *Francis Bedwell*, by the sheriff of *Gloucestershire*, the goods were claimed by *Thomas Bedwell*, defendant's brother. The sheriff applied for relief under the Interpleader Act, 1 & 2 W. 4. c. 58.; whereupon a Judge's order was made that the goods seized should be sold, and the proceeds, less the expenses of the sale, paid into Court, to abide the event of a feigned issue, unless the claimant should give security to the sheriff for the return of the goods. The order directed that the issue, on which the claimant was to be plaintiff and *Staley* the defendant, should contain three counts, to try the following questions respectively; viz.,

1. Whether the goods, or any part thereof, were the sole property of the claimant.
2. Whether they, or any part, were the sole property of the defendant *Francis Bedwell*.
3. Whether they, or any part, were the joint property of the claimant and the defendant *Francis Bedwell*, as partners.

The jury were further to be directed to find specially the value of any part of the goods that should be proved to be the sole property of *Thomas*, or of *Francis*, or of *Thomas* and *Francis* jointly. The sheriff's costs of keeping possession till the time of sale were to be paid by the claimant; the costs of the issue, and the residue of the costs of the sheriff, his poundage, and the return of the goods, to abide the further order of the Court. No security being offered to the sheriff, he sold the goods for 68*l.* 5*s.* 3*d.*, and, after deducting

therefrom

An interpleader rule directed the sheriff to sell the goods claimed, and pay the proceeds into Court to abide the event of an issue between the claimant and the execution creditor, to try the right to them. The jury, on the trial of the issue, found that part of the goods were the sole property of the claimant, and the residue the joint property of the claimant and the party levied upon: Held, that the claimant was entitled to be paid by the execution creditor the general costs of the feigned issue, (deducting the costs of the issues found for the latter,) and also the costs of appearing to the interpleader rule, and of his subsequent application for the money paid into Court and for his costs. And the sheriff was refused his costs of the interpleader rule.

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therefrom 3*l.* 8*s.* 3*d.* for expenses, and 12*l.* 10*s.* for rent due at the time of the levy in respect of premises occupied by *Thomas* and *Francis Bedwell* in common, paid into Court the residue, viz. 52*l.* 7*s.*, pursuant to the order of *Staley*, the defendant in the issue, pleaded to the first count that no part of the goods was the sole property of *Thomas Bedwell*; to the second count, that the goods were, or part thereof was, the sole property of *Francis Bedwell*; and to the third count, that the goods were or part thereof was, the joint property of *Thomas* and *Francis* as partners: on all which pleas issue was joined.

The jury, upon the trial of the issue before *Patterson J.*, at the *Gloucestershire Lent* assizes, 1839, found that the goods seized consisted of household furniture worth 32*l.* 13*s.*, and of office furniture worth 32*l.* 4*s.*; they found for the plaintiff *Thomas Bedwell* on all the issues as to the household furniture; and as to the office furniture they found for the defendant on the first and third issues, and for the plaintiff on the second.

In the early part of this term, *Gray*, for the claimant *Thomas Bedwell*, obtained a rule calling upon the plaintiff and the sheriff to shew cause why 26*l.* 8*s.* (being the value of the household goods minus half the rent) at 12*l.* 19*s.* 6*d.* (being half the value of the office goods minus the other half of the rent) should not be paid out of Court to the claimant *Thomas Bedwell*; and why plaintiff should not pay claimant all costs incurred by the seizure of his goods, and of the application by the sheriff; of the feigned issues, deducting the costs, if any of those found for the now plaintiff *Staley*; and of the claimant's application to this Court.

W. J. Alexander

W. J. Alexander for the plaintiff, and *Whitmore* for the sheriff, now shewed cause. The latter contended that the sheriff was entitled to the costs of his application under the Interpleader Act, and of this application, as well as to possession-money, as directed by the original order.

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Gray, contra. The sheriff should not be allowed the costs of seeking relief under the Interpleader Act (a), especially in a case like the present, where the finding of the jury and the facts of the case shew that he was wrong in taking them. *Thomas Bedwell*, the claimant, was entitled to the general costs of the cause from the execution creditor, as if the question of property had been tried in an action of trover, in which case a partial failure would not have deprived him of those costs. So the costs of appearing and of this application would equally have been incurred if *Thomas Bedwell* had originally narrowed his claim to the goods actually found to be his: he is, therefore, entitled to those costs also.

Lord DENMAN C. J. The claimant is entitled to receive out of Court the value of the household goods, deducting half the rent, viz. 26*l.* 8*s.* To this must be added a moiety of the office goods, with the deduction specified in the rule nisi. The whole amount is 39*l.* 7*s.* 6*d.*. Out of this he is to pay the sheriff the expense of possession, agreeably to the original order (b), leaving the sum of 34*l.* 9*s.* 6*d.* to be paid out of Court to *Thomas Bedwell* the claimant. Then, besides the

(a) See *West v. Rotherham*, 2 New Ca. 527. ;

(b) This was taken at 4*l.* 18*s.*

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possession money, the poundage on the amount legally levied, amounting to 16s., is to be paid to the sheriff. The residue, 12*l.* 3*s.* 6*d.*, will belong to the plaintiff in this action. Then, as to the costs of the feigned issues, the case is like that of an ordinary action of trover with a verdict for the plaintiff on some of the issues; therefore the claimant is entitled to the general costs of those issues to be paid by the plaintiff *Staley* to him, deducting those of *Staley* on the issues on which he has succeeded. He ought also to have the costs of appearing in the first instance, and of this application. The sheriff is not entitled to the costs of availing himself of the Interpleader Act. The officer grossly misconducted himself in seizing the claimant's goods. It is a case in which the sheriff would not have seized, if he had not relied upon the aid of the Interpleader Act (*a*).

LITLEDALE and PATTESON Js. concurred.

COLERIDGE J. I concur, on the particular circumstances of the case.

Rule absolute for the payment of the several sums of 3*l.* 9*s.* 6*d.*, 12*l.* 3*s.* 6*d.*, and 5*l.* 14*s.*, to the claimant, the plaintiff and the sheriff respectively, with a reference to the Master to tax to the claimant the general costs of the cause (deducting those of the plaintiff on the issues on which he has succeeded), and also the costs of appearing in the first instance, and of this application; said costs, when taxed, to be paid by plaintiff to the claimant.

(*a*) The facts of the case did not appear upon the argument.

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HOLLAND and Another, Assignees of HAYWARD, *Wednesday, May 8th.*
a Bankrupt, against PHILLIPPS.

SCIRE facias, issued in *November 1837*, by the assignees of *Hayward*, a bankrupt, to make themselves parties to a judgment recovered by him against the defendant. Defendant pleaded, 1. that *Hayward* was not a bankrupt; 2. payment and satisfaction to the bankrupt before his bankruptcy. Defendant also gave notice of his intention to dispute the trading, the act of bankruptcy, and the petitioning creditor's debt. Issue was joined, and a copy thereof delivered to defendant, when it was discovered that the official assignee had been inadvertently omitted as co-plaintiff in the writ of scire facias. A rule was thereupon obtained in this term to shew cause why the proceedings should not be amended by introducing him as one of the plaintiffs.

To scire facias by the assignees of a bankrupt on a judgment, the defendant pleaded, 1. denial of the bankruptcy; 2. satisfaction to the bankrupt, on which pleas issues were joined. The Court permitted the proceedings to be amended on payment of costs, by joining the official assignee, (who had been inadvertently omitted as a co-plaintiff,) though the application had been delayed a year and a half after the issuing of the writ; the defendant being allowed to plead de novo.

M. Smith now shewed cause. A scire facias was formerly supposed not to be amendable: note (4) to *Underhill v. Devereux* (a). The practice is different now, and there are authorities for permitting it, provided there be something to amend by, or the proceedings be in paper. In *Thorpe v. Hook* (b), the amendment was made from the original judgment roll; and it was a mere error in the Christian name of the defendant. In *Baker v. Neaver* (c) the proceedings were still in paper. The defendant may be prejudiced, for he may

(a) 2 *Wms. Saund.* 72 p.(b) 1 *Dowl. P. C.* 501.(c) 1 *C. & M.* 112.

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discharge himself by paying the present plaintiffs, whereas, if the official assignee is a plaintiff, he can only pay to him: 1 & 2 W. 4. c. 56. s. 22. Besides, there has been great delay in correcting the error, for the writ was issued in 1837.

Sir John Campbell, Attorney-General, contra. It is a mere case of inadvertence, which the defendant has taken no advantage of in his pleas. The second plea alleges satisfaction to the bankrupt before his bankruptcy, so that no question can arise about payment to the assignees. The nonjoinder would be no defence upon either plea; and the defendant therefore suffers no prejudice by the amendment, though the plaintiffs may be prejudiced by the error. [*Littledale J.* How can it now prejudice either party?] The defendant may be lying by to take some advantage of the omission hereafter. It is not like asking to alter a judgment, for the scire facias is in the nature of a fresh action, and the proceedings, quoad hoc, are still in paper. All the assignees together only make one representative of the bankrupt; so that this is in the nature of a mere misnomer. In *Baker v. Neaver* (a) the official assignee was added after declaration in an action by assignees, and Lord Lyndhurst C. B. distinguished the case from that of an ordinary plaintiff, but intimated that the amendment might be refused if the defendant made affidavit that he relied on the omission as a defence. Here no such affidavit has been, or can be, made. In *Rex v. Scott* (b) an amendment of a scire facias was allowed after plea.

(a) 1 C. & M. 112.

(b) 4 Price, 181.

Per

Per Curiam (a). The amendment may be made on payment of costs, with liberty for the defendant to plead *de novo*.

Rule absolute to amend accordingly.

(c) Lord Denman C. J., Littledale, Patteson, and Coleridge Js.

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EVANS *against* REES.

Wednesday,
May 8th.

REPLEVIN for cattle taken in the parish of *Ystrad Gunlais*, in the county of *Brecon*. Avowry, damage feasant there. Plea, that the cattle were taken in *Cadoxton* parish, in the county of *Glamorgan*, and driven thence into the parish and county mentioned in the declaration, and impounded there. Replication, that the cattle were not taken in the parish of *Cadoxton* and county of *Glamorgan*.

On the trial before *Coleridge J.*, at the last *Brecon* Spring assizes, the sole enquiry was as to the true boundary between the above parishes and counties. In the course of it, an award respecting the boundary was tendered on the part of the plaintiff. It appeared that an action had formerly been brought by a commoner for disturbance, to which there was a plea of not guilty, and in which a question arose respecting the same boundary, and a verdict had been taken subject to the award of an arbitrator with power to set out the boundary proved before him. By his direction, a verdict was entered for the plaintiff in that suit, and the boundary

On an issue respecting the boundary of a parish and county, an award in a suit *inter alios*, in which the arbitrator set out the boundary as proved before him, and a verdict was entered according to his direction is not admissible as evidence of such boundary.

Although verdicts are, upon authority, admitted as proof of reputation, the rule does not extend to awards.

A presentment in a manor court, setting forth the bounds of a manor, is admissible evidence of such bounds, though part of the document, un-

connected with the subject of bounds, has been cut out. Where an ancient manor-book is offered in evidence, the custody must be proved by a sworn witness. It is not enough that the book is produced in court by the counsel or steward of the lord of the manor, nor, as it seems, by the lord of the manor in person.

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was determined by the award. The parties to that action were neither the same as, nor in privity with, the parties to this. The learned Judge admitted the record in the action, but rejected the award. The defendant offered in evidence certain presentments of a manor court found in the castle of *Brecon*, in one of which the boundary was set out. Part of it, containing the parish in question, had been cut off, but the part so removed appeared to have contained entries unconnected with the subject of boundary. It was objected to as inadmissible by reason of its imperfect state. The learned Judge admitted it, though he had no doubt that the mutilation was not accidental. The plaintiff also produced certain ancient manor-books, which his counsel proposed to read without proving the custody from which they came; on the ground that the lord of the manor, Mr. *Leigh*, to whom they belonged, and who was admitted to be the real plaintiff, might himself have produced them in court without further proof of custody, and might therefore authorise his counsel to do so for him. The learned Judge held them inadmissible, unless the custody from which they came was proved. Verdict for the defendant. In this term (*a*)

Evans moved for a rule to shew cause why a new trial should not be granted on the grounds of the rejection of the award, the admission of improper evidence, misdirection (*b*), and that the verdict was contrary to the evidence. The award was admissible on the same prin-

(*a*) April 22d. Before Lord Denman C. J., Littledale, Patteson, and Coleridge Js.

(*b*) The refusal to admit the manor books was called, by the Court and counsel, *misdirection*.

ciple as a verdict. It was proof of reputation, though *res inter alios*: *Reed v. Jackson* (a). Here the arbitrator was in the place of a jury, and the verdict, when entered, ought to be of the same weight as if actually found by them: *Lee v. Lingard* (b), *Bonner v. Charlton* (c), per *Le Blanc J.* The award, coupled with the verdict, is equivalent to a special verdict. So a decree in equity between third parties has been admitted as evidence of a custom of a public nature; *Laybourn v. Crisp* (d); and analogous instances are mentioned in *Bull. N. P.* 233. [*Coleridge J.* A jury could not have set out a boundary as the arbitrator here professed to do.] The award is founded, indeed, on the evidence of others, but this is equally an objection to the verdict of a jury, who speak only upon the information of others. [*Patteson J.* I never could understand why the opinion of twelve men should be evidence of reputation. *Coleridge J.* Though the doctrine is perhaps established as to the admissibility of verdicts, it does not appear to be founded on any satisfactory principle. In *Rex v. Cotton* (e), on a question of liability to repair a highway, *Dampier J.* rejected an award as being *res inter alios* and *post litem motam*. In *Rogers v. Wood* (g) an award, not founded on personal knowledge of the facts, was held inadmissible as evidence of reputation.] As to the presentments, their mutilated and imperfect state ought to have excluded them, though they came from the right custody. The presumption is that the part removed was material, and against the interest of the party producing them, especially as the destruction was evi-

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(a) 1 *East*, 355.(c) 5 *East*, 139.(e) 3 *Camp.* 444.(b) 1 *East*, 401.(d) 4 *M. & W.* 320.(g) 2 *B. & Ad.* 245.

dently

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dently wilful. Their state required explanation, like erasures in a deed or other security. Then the plaintiff ought not to have been compelled to call a witness to speak to the custody of the ancient documents. It was enough that counsel, or steward, or any party authorised by Mr. Leigh, produced them. [Coleridge J. If it be necessary to prove the custody of ancient documents, some one must be sworn for that purpose. The person producing them may have had them from a grocer's shop.] So they may have been procured from a shop and taken to the muniment room; yet when produced from that room they would be admissible evidence. Mr. Leigh was the lawful custos, and he might bring them into court himself, or hand them to his counsel or attorney in court. [Evans then contended that the verdict was against evidence.]

Per Curiam. There was no misdirection on the last point; with respect to the other points

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.

This was an action of replevin, and the question on which it turned was, what is the true boundary of the counties of Glamorgan and Brecon near the spot where the plaintiff's cattle were distrained? The verdict was for the defendant. On a motion for a new trial, three grounds were stated by the counsel for the plaintiff, on which the Court took time to consider, another ground as to misdirection having been disposed of upon the argument. The grounds were: First, that an award tendered in evidence was rejected by the learned Judge.

The

The award was made very recently in an action on the case brought by a person alleging himself to be a commoner, for digging a ditch, which the present plaintiff asserts to be the true boundary, and so disturbing the right of common. The plea in that case was Not guilty, and the cause was referred at nisi prius, with power to the arbitrator to set out the boundary which should be proved before him, and to direct which way the verdict should be finally entered. He directed a verdict to stand for the plaintiff, and set out the boundary, as he conceived it to be proved, by his award. That award, not being made between the same parties as those in the present action, could not be used as binding upon them, but was offered as evidence of reputation, the boundary being a matter of general and public interest. The cases of *Reed v. Jackson* (a) and *Laybourn v. Crisp* (b), and others, were cited to shew that a verdict on such matters, although between strangers to the parties on the record, is evidence of reputation; and it was contended that the award in this case was to be considered as part of the verdict, and admissible on the same grounds.

We cannot agree to this view of the case. The authority of an arbitrator is entirely derived from the consent of the parties to the reference; his award has no force except by reason of that consent, and no instance can be proved in which strangers have been held to be in any way affected in their rights by an award, either as evidence of right or of reputation. The award is but the opinion of the arbitrator, formed, not upon his own knowledge, as declarations used by way of reputation commonly are, but upon the result of evidence laid be-

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fore him, most probably in private, and formed also post-litem motam, having none of the qualities upon which evidence of reputation rests. It may be said that the verdict of a jury is equally defective in such qualities. Whether it be so or not, it is sufficient to say that the admissibility of a verdict as evidence of reputation is established by too many authorities to be now questioned, but that the principle of those authorities is not clear enough to embrace an award. We are therefore of opinion that the learned Judge was perfectly right in rejecting the award.

The second ground was, that a presentment found in the castle of *Brecon* was admitted in evidence, although a considerable portion of the parchment on which it was written had been cut off, and it was supposed that the part cut off might have contained something adverse to the interests of the party producing it. We are of opinion that no sufficient ground is laid for supposing any thing of the sort, and inasmuch as that part of the presentment which related to the boundary in question was in itself perfect, we cannot see any reason for rejecting this document, and think that it was properly admitted.

The third ground was that the verdict was against the evidence. [On this point his Lordship said that the case was one entirely for the jury, and that the Court could not say they had drawn a wrong conclusion.]

Rule refused (a).

(a) See *Brett v. Reales*, M. & M. 416. It is observable, that in *Reed v. Jackson*, 1 East, 355. the verdict of the jury on the plea of a public right of way, which was admitted to prove the non-existence of such way, seems to have been entered for the plaintiff without any evidence at all, the contest on the trial having been confined to another plea alleging a right to enter for the purpose of washing sheep.

1839.

The QUEEN *against* LUMSDAINE (a).

ON appeal against a rate, made *June* 2d, 1838, for the relief of the poor of the parish of *Wimborne Minster*, in *Dorsetshire*, the sessions confirmed the rate, subject to the opinion of this Court on the following case.

The rate, which was in the form prescribed by stat. 6 & 7 *W. c.* 96. and the rules of the Poor Law Commissioners, was published as required by the statute. No stock in trade was rated in the said rate: there was considerable stock in trade yielding profit in the said parish at the time when the rate was made. The parish contains 12,000 acres, or thereabouts, rateable to the relief of the poor.

In the year 1833, stock in trade not having been included in a rate made on the 3d of *May* of that year for the relief of the poor of the said parish, an appeal was entered at the then ensuing *Midsummer* sessions, on the ground that stock in trade, yielding profit within the parish, was not included in the said rate. The hearing of the appeal was adjourned to the then next sessions, when the respondents abandoned the said last-mentioned rate, and it was quashed, and a new rate was made on the 28th of *February* 1834, in which stock in trade was assessed from that time. Stock in trade continued to be regularly rated in the said parish down to the month of *June* 1835 inclusive. It appeared from the rate-books of the said parish that stock in trade had not been rated therein from the year 1796 until the said

The parochial assessment act, 6 & 7 *W.* 4. c. 96., does not alter the law as to the rateability of personal property; therefore a poor rate made after the statute, omitting stock in trade which yields a profit in the parish, is liable to be quashed on appeal.

(a) This case was argued and decided on *April* 27th, but has been misplaced in consequence of an accidental delay.

rate

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rate of *February* 1834, and there was no evidence of stock in trade having been rated in the parish previous to 1796. Stock in trade has not been assessed in the said parish since the month of *June* 1835. The question for the consideration of this Court was, whether stock in trade yielding profit in the said parish ought or ought not to have been assessed in the said rate made on the 2d of *June* 1838, and if this Court was of the former opinion, then the order of sessions and the rate were to be quashed.

Sir John Campbell, Attorney-General, *Stock*, and *Reade*, in support of the order of sessions. There has been no express decision, upon argument, that stock in trade is rateable. Lord Mansfield inclined against the rateability, and the Court has questioned it in some instances, though it has been reluctantly allowed in others *Rex v. Witney (a)*, *Rex v. Ringwood (b)*, *Rex v. Amble side (c)*, *Regina v. Barking (d)*. [*Patteson J.* Shipping has been constantly rated. There have been cases at *Liverpool*, *Holyhead*, *Wisbeach*, and elsewhere, in which such rates have been held maintainable (e).] At all events the Parochial Assessment Act, 6 & 7 W. 4. c. 96., determines the point. It is inconsistent with the continued rateability of personal property, and therefore abrogates pro tanto the statute 43 Eliz. c. 2. It gives a form in which rates shall be allowed for the future, and that form does not provide for a rate on any property except real property and corporeal "hereditaments" (g). And the

(a) 5 Burr. 2634.

(b) Cowp. 326.

(c) 16 East, 380.

(d) 2 Ld. Ray. 1280.

(e) See *Rex v. Liverpool*, 8 East, 455. note (d); *Rex v. Jones*, 8 East, 451; *Rex v. Shepherd*, 1 B. & Ald. 109.

(g) Sects. 1, 2, 3, and the schedule, were referred to on this point.

act

act expressly legislates for parish assessments generally, and not merely for part of the objects of assessment. As the Courts have narrowed the construction of stat. 43 *Eliz. c. 2.*, which is in terms general enough to include all inhabitants in respect of any personal property, so the Parochial Assessment Act further interprets and restrains the statute of *Elizabeth*, and excludes personal property from its operation. Even affirmative words in a later statute may restrain a former one: *Foster's Case* (a), *Slade v. Drake* (b), *Rex v. Coode* (c), *Rex v. Justices of Worcestershire* (d). [*Coleridge J.* Section 2 of stat. 6 & 7 *W. 4. c. 96.* only provides that the rate shall contain the particulars mentioned in the form, "in addition to" the other particulars required in the rate.] That refers, not to any additional subject of a rate, but to additional particulars respecting the hereditament rated. The proviso in sect. 1, preserving the relative proportions of liability between different kinds of hereditaments, was introduced in consequence of *Rex v. Joddrell* (e), and has no reference to personal property. At all events, the rate exactly follows the prescribed form, and therefore it is *ex facie* good, and cannot be quashed. [Lord *Denman C. J.* The rate in another form may be bad, but it does not follow that every rate in that form is good.]

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Bond and *Lucena*, contra, were not called upon.

Lord DENMAN C. J. It is not improbable that the legislature intended to alter the law upon the subject

(a) 11 *Rep.* 56 b.(b) *Hob.* 295. 5th ed. See p. 298.(c) *Cald.* 464. *S. C.* 1 *Bott.* 307. pl. 290. 6th ed.(d) 3 *M. & S.* 457.(e) 1 *B. & Ad.* 403.

of

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of rating personal property ; but I am clearly of opinion that the intention has not been carried into effect. The object of the act does not appear to have been to introduce any new principle of rating, but to affirm that which had been already established by decisions of this Court. The form given in the schedule certainly contemplates only the rating of corporeal hereditaments, and this is urged as a declaration of the law by parliament upon a point which is suggested to have been before doubtful. There has, however, existed a known and long established practice of rating personal property in many cases, and the legality of such rates has been affirmed by this Court. The law, therefore, is not to be altered except by express enactment. We cannot, in such a case, admit it to be repealed by implication, where the legislature might so easily have repealed it in direct terms.

LITLEDALE J. Stat. 43 *Eliz. c. 2. s. 1.* embraces two classes of persons subject to taxation ; occupiers of real property, and inhabitants in respect of personal property. Hitherto rates upon the latter class have been in practice confined to stock in trade and shipping ; but on future occasions other kinds of personal property may perhaps be rated, and be held rateable. The provisions of this act apply only to the former class of rateable objects, and leave the second at large as before. There is nothing that amounts to a repeal of the law on this head, nor can the act be considered as a declaratory one.

PATTESON J. Personal property is rateable if visible and profitable, and this act points at no repeal of the existing law. The provision respecting the uniform
mode

mode of rating evidently points at the decisions in *Rex v. Joddrell* (a) and similar cases.

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COLERIDGE J. We are told that we must collect from the act an intention to alter stat. 43 *Elizabeth*, c. 2.; but this cannot be done. The Court has always regarded personal property as being within the operation of that statute. The reluctance with which the rateability of it has been admitted by the Court, only tends to strengthen the argument in favour of the rate; and the silence of the act as to the mode of rating one species of property, is evidence that it points only at the other.

Orders quashed.

(a) 1 B. & Ad. 403.

END OF EASTER TERM.

C A S E S

1839.

ARGUED AND DETERMINED

IN THE

Court of QUEEN'S BENCH,

AND

UPON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

Trinity Term,

In the Second Year of the Reign of VICTORIA.

The Judges who usually sat in Banc in this Term were—

LORD DENMAN C. J.

PATTESON J.

LITLEDALE J.

WILLIAMS J.

The cases decided in the Queen's Bench this term, and argued during the term, are reported jointly by Mr. *Ellis* and Mr. *Smirke*: those argued in former vacations, by Mr. *Smirke*; the rest by Mr. *Adolphus* and Mr. *Ellis*.

BENTALL, Esquire, One of the Clerks of the Petty Bag of His Majesty's High Court of Chancery, *against* Sir WILLIAM ROBERT SYDNEY, Knight.

A party wishing to produce the roll of attorneys in the Court of Chancery as evidence on a trial in

DECLARATION (filed in the Petty Bag Office in Chancery), in debt, for 20*l.*, for fees and reward due and owing, and of right payable, from and by defendant

to

K. B., applied to the senior clerk of the Petty Bag Office, to procure an order from the Master of the Rolls for their production, which was granted, according to the usual practice;

to plaintiff as senior clerk of the Petty Bag of the Court of Chancery at *Westminster*, for the work and labour, care, diligence, journeys, and attendances of plaintiff, by him done, performed, and bestowed at defendant's request, and for divers attendances with divers rolls and books containing the inrolment of the admission of solicitors of the Court of Chancery aforesaid, and other records, before that time made and bestowed by plaintiff as such senior clerk in his Majesty's Court of King's Bench at *Westminster*, and elsewhere, at defendant's request. Counts for other work, for money paid, and on an account stated. Pleas: Never indebted; and payment of 1*l.* 19*s.* in full satisfaction of the debt and damages as to that sum. Issues thereon.

Particulars of Demand.

1836. <i>June</i> 13th. Petition, and paid for order of the Master of the Rolls to produce the Solicitors' rolls on trial in the Court of King's Bench at <i>Westminster</i>	-	£0	12	0	
14th. Attending the Court of King's Bench with three books	-	-	1	1	0
Paid cab hire there and back with books	-	0	2	0	
15th. The like	-	-	1	3	0
16th. The like	-	-	1	3	0
17th. The like	-	-	1	3	0
			<hr/>		
			5	4	0
Received on account	-	-	1	13	0
			<hr/>		
			£3	11	0

On the trial before *Littledale J.*, at the sittings in *Middlesex* in *Michaelmas* term 1837, the following facts appeared (a).

(a) The ensuing statement in the text is that which was given in the judgment of the Court. See p. 157. post.

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against
STEWART.

tice, and the senior clerk was then subpoenaed to produce the roll, he being the proper officer. Held, that the clerk might claim, for attendance at the trial with such roll, not the common remuneration of a witness appearing on a subpoena duces tecum, but reasonable fees, to a larger amount, which were proved to have been usually paid, for fifty years past, to clerks attending with records from the Petty Bag Office. Although he did not, when subpoenaed, inform the party, that he should demand remuneration as a clerk attending under the order of the Master of the Rolls, and not as an ordinary witness. And although he did not produce the roll himself, but sent it by his clerk.

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against
SYDNEY.

The defendant was desirous of having the Rolls of the Court of Chancery to give in evidence in a cause of *Hill v. Sydney*; and he applied to the plaintiff, who was the senior clerk in the Petty Bag Office, to get an order from the Master of the Rolls for their production, which order the plaintiff procured (a).

The plaintiff was served with a subpoena duces tecum to produce these rolls on the trial of the cause, which was set down for the 14th *June*, on which and the three following days one of the clerks in the Petty Bag Office attended the Court of King's Bench. On the last of those days the cause was tried, and the rolls were produced by the clerk, and put in evidence. The rolls were contained in three folio volumes, more than he could well carry from *Chancery-Lane* to *Westminster*; and he carried them backwards and forwards in a coach.

In the office of the Petty Bag the ordinary common law business of the Court of Chancery is transacted. There are three principal clerks in the Petty Bag Office; and they have no salaries, but are paid by fees: they jointly appoint a deputy clerk, who has a fixed salary; and he appoints clerks, who are paid by him. The plaintiff is the senior of the three principal clerks; and as such he is entitled to the custody of the rolls in the Court of Chancery. It is the official business of the plaintiff to produce the rolls by himself or his clerk; generally by his clerk: and that business belongs exclu-

(a) The order was as follows.

"Monday, the 13th day of June, in the 6th year" &c.

"Ex parte Sir Robert Sydney, Knight. Upon the humble petition of the said Sir Robert Sydney this day preferred unto the Right Honourable the Master of the Rolls, for the reasons therein contained, it is ordered that the proper officer do attend with and produce the roll of solicitors of this Court on the trial of a certain action brought against the petitioner which is about to be tried in the Court of King's Bench."

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sively to him, and he alone receives all the fees and emoluments which arise in respect of it: but some branches of the business of the Petty Bag are paid by fees, which are divided amongst the three principal clerks.

When the subpœna was served, and order obtained, one guinea was paid for attendance, and 12s. for the order; and the sum which the plaintiff sought to recover in this action was three guineas for three days' further attendance after the first day, and 8s., being 2s. a day, for four days' coach hire. The clerk saw the defendant at his office the first day. The clerk asked the defendant if he was to attend on the following day: the defendant said "certainly." The clerk asked the defendant for the fees for the next day's attendance. The defendant said there was a great probability of the cause not being tried that day, but it would the following day, and that the fees should then be paid all together. The clerk, at a subsequent time, told the defendant that the plaintiff had desired him to say that if he the defendant would pay the plaintiff the fees claimed, the plaintiff would forego any costs. The defendant said that if Mr. *Bentall* had chosen to wait till the cause of *Hill and Randall v. Sydney* was settled, then the fees would have been paid, but it was only on that principle that he resisted.

It appeared that in the year 1743 Lord *Hardwicke*, then Lord Chancellor, made orders as to fees in the offices in the Court of Chancery: and amongst those in the Petty Bag Office there was a direction (a) that: "For attending with any record out of the office, the

(a) The reception of this order in evidence was objected to on the trial; and the objection was again mentioned in argument on the rule, but became ultimately immaterial.

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clerk attending is to be paid a reasonable fee, according to the time of such attendance" (a). Evidence was given that for between forty and fifty years a guinea a day had been regularly paid for attending a Court with the rolls, and it had occurred hundreds of times, and never been known to be resisted but once.

Kelly, for the defendant, contended that, on these facts, the plaintiff was not entitled to recover. The learned Judge directed a verdict for the plaintiff, giving leave to the defendant to move to enter a nonsuit. In the ensuing term a rule nisi was moved for accordingly. The grounds of the motion were, that no compensation beyond that of an ordinary witness could be claimed for the attendances in question; and that, if such right did not exist originally, it could not be given by the defendant's subsequent promise: to which points *Collins v. Godefroy* (b) was cited. It was also suggested that the compensation, if claimable at all, should have been sued for, not by the plaintiff, but by the clerk who actually produced the document. A rule nisi was granted.

In *Easter* term 1839 (c), Sir *F. Pollock* and *Hoggins* shewed cause, and *Kelly* supported the rule. The whole argument is so fully gone into in the judgment of the Court, that no further report is necessary.

Lord DENMAN C. J. in this term (*June 5th*) delivered judgment. After stating the nature of the action, and

(a) See *Beames's General Orders of the High Court of Chancery*, where the whole of Lord *Hardwicke's* order is set out; pp. 369—449. The paragraph in question is at p. 404.

(b) 1 B. & Ad. 950.

(c) *May 2d.* Before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

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the facts, as detailed, p. 164. to 166. antè, his Lordship continued.

Mr. Kelly applied for a nonsuit, which my learned brother gave him leave to move for. The rule was argued last term; and it was urged, on the part of the defendant, that the case must be governed by *Collins v. Godefroy (a)*, where the Court held, upon a review of the cases, and the construction of stat. 5 Eliz. c. 9. s. 12., that an action does not lie for a compensation to a witness for loss of time in attendances upon a subpoena, though the plaintiff there was an attorney, and contended that, being a professional man, the rule ought not to apply to him. It was also contended that the subsequent promise to pay made no difference, if there was no original consideration for the demand, as was held in *Collins v. Godefroy (a)*; and that Lord Hardwicke had no right to impose a fee by which the King's subjects could be bound; and that, if he had such right, the defendant ought to have had notice of the fee: and that, as the plaintiff accepted service of the subpoena without telling the defendant that he did not consider himself bound by the common obligation of the service of the subpoena, but that he should require payment according to Lord Hardwicke's order, he cannot now insist that he stands upon a different footing from any person who is served with a subpoena. And it was also contended that the plaintiff, not having personally attended on the production of the rolls, is not entitled to the fee.

We think that the rolls of the Court of Chancery cannot be taken out of the Court to be given in evi-

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dence as a matter of course; and that neither the Master of the Rolls, nor the plaintiff as the senior clerk in the Petty Bag Office, would be compellable to produce them on a subpœna alone; but there must be an order of the Master of the Rolls for that purpose. These records are open to public inspection, and any body wishing for a copy of them may have it in the usual way, upon paying for it: or a party may, if he prefers, apply to the Master of the Rolls for an order that the rolls themselves should be produced; and he is in the habit of granting such orders; but he would not suffer the rolls to be carried out of the office by any body but one of the officers of the Court: and it is not reasonable that the officers of the Court should leave their duties for the purpose of carrying these rolls wherever a party in a cause may wish, without being paid for their trouble and attendance. And, whether Lord *Hardwicke* had a right to constitute *legal* fees by his orders or not, yet this was a fee which was so far optional with those who wanted the records out of the office that, as they were not entitled to have them out of the office of right, but only on an application to the Master of the Rolls, if they chose to have them, they were bound to pay for them a reasonable fee according to the terms imposed by Lord *Hardwicke*.

These orders of Lord *Hardwicke* of 1743 are stated in *Beames's Orders in Chancery*, 369 (a): and the part which relates to a clerk of the Petty Bag Office attending with the records is in page 404. The obligation to attend the Court arises no doubt from the subpœna; but that subpœna is served upon a person who in the ordinary

(a) See p. 166., note (a), *antè*.

course of things is not primarily bound to attend to it: it originates with the Master of the Rolls; and he or the Chancellor may very reasonably say that he will not grant an order for the carrying the rolls to and fro, unless the officers are paid for their trouble: and we think we are not to confine the necessity of obeying the subpoena to the service, as in *Collins v. Godefroy (a)*, but we must also look to the order of the Master of the Rolls.

We think it not necessary that the defendant should have had notice of any order of the Chancellor as to a remuneration to the officer of the Petty Bag. If a defendant, instead of applying for an examined copy of such part of the rolls as he wants, chooses to get an order for their production, he must be supposed to be cognisant of the rules of the office in that respect, and which, independent of Lord *Hardwicke's* order, have prevailed between forty and fifty years; and there was no necessity for the plaintiff to tell him that he relied upon the order of the Master of the Rolls, and did not consider himself bound by the obligation of the subpoena as in ordinary cases; and the statements of the defendant on two occasions are quite sufficient to shew that he was acquainted with the custom of the office.

We think it no objection to the plaintiff's right to recover, that he did not personally attend. According to the custom of the office the duty of producing the records was cast upon him; but there was nothing personally requiring his attendance; it was the same thing whether one of the clerks or another had the custody of the rolls to produce, as long as they were in the keeping of the officers of the Court of Chancery; in

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fact the plaintiff scarcely ever personally attended ; but the fee was due to the plaintiff whichever of the clerks attended.

Indeed it is singular enough, as to the Petty Bag, that if issue be joined the Chancellor delivers the record with his own hands to the King's Bench to be there tried ; 4 *Inst.* 80., 1 *Equity Cases Abridged*, 128. (a) : but, if the record be delivered by the clerk of the Petty Bag, it will be well removed ; for that may be said to be propriâ manu of the Chancellor, which is done by his officer ; 1 *Equity Cases Abridged*, 128, 129 (b).

We think, therefore, this case does not fall within *Collins v. Godefroy* (c) : for the plaintiff does not attend merely in consequence of the subpoena ; for that alone would not have been sufficient to compel him to produce the rolls : but he attends in consequence of the order of the Master of the Rolls and the subpoena together : and we think that the plaintiff is entitled to recover a reasonable compensation for his attendance on the production of the rolls.

The rule, therefore, must be discharged.

Rule discharged.

(a) *Courts and their Jurisdiction*, (A), pl. 7.

(b) *Courts and their Jurisdiction*, (A), pl. 8.

(c) 1 *B. & Ad.* 950.

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The QUEEN against THOMAS BRIGHTWELL.

QUO warranto information for exercising the office of an alderman of the city of *Norwich*. Pleas, alleging that defendant was duly elected by the councillors of the city first elected under stat. 5 & 6 W. 4. c. 76., being assembled together for the purpose of electing aldermen. Replication. 1. To the first plea: "That, at the meeting and assembly of the said councillors in the said plea mentioned, at the time when they so met and assembled together at the *Guildhall* for the purpose of electing the said aldermen as in the said first plea mentioned, *John Barwell*," &c. (naming sixteen persons, among whom was the defendant), "were by one *William Foster*, one of the said councillors of the said city, proposed jointly and together for aldermen of the said city; and that it was then and there by the said *William Foster* proposed that the said last-mentioned persons, together with the said defendant *Thomas*, should be elected jointly to be aldermen of the said city, and the same were then and there by the greater part of the said councillors, so assembled as last aforesaid, jointly and together voted and declared to be elected and chosen aldermen of the said city;" and "that there was not then and there, nor at any other time, any separate proposal nor any separate vote nor declaration made to or come to by the said councillors or any of them, that the said defendant *Thomas* should be or was elected an alderman of the said city: without this, that the greater part

Where a given number of aldermen was to be elected on a given day, under stat. 5 & 6 W. 4. c. 76. s. 25., which prescribed no particular mode of electing (see now stat. 7 W. 4. & 1 Vict. c. 78. s. 14.), the proper mode was to put to the vote a list containing as many names as there were vacancies to be filled up, any elector being at liberty to propose and have put to the vote a list of his own.

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part of the said councillors so assembled as last aforesaid did duly elect the said defendant *Thomas* to be one of the aldermen of the said city in manner and form &c.: verification. Replication, 2. To the same plea, that the greater part of the said councillors &c. did not duly elect defendant to be one of the aldermen &c. Conclusion to the country. (The other pleas were replied to in similar form.) Rejoinder, to replication 1., that the greater part of the said councillors so assembled &c. did duly elect &c. in manner and form &c.: Conclusion to the country. To replication 2., similiter. Issues were tendered and joined on the other parts of the replication, all raising the same question.

On the trial before *Park J.*, at the *Norfolk* Spring assizes, 1837, it appeared that at the meeting of councillors for the election of aldermen, on *December 31st*, 1835, there were sixteen aldermen to be elected, and an individual councillor presented to the chairman a list of sixteen, including the defendant, and moved that all the names in that list should be adopted. A councillor present objected to the names being put jointly, and, without resisting the adoption of any in particular, which he said would be invidious, proposed two others, to be added to the list. This was put to the vote, and negatived. The names first mentioned were then read to the meeting, and the chairman asked if any other name was proposed. The adoption of the list was then voted, by a single resolution. When the objection was made to voting by lists, the chairman said that any person objecting to the list produced might propose another; or that any particular name in the list then proposed might be objected to. The chairman stated, on the trial, that

“ nothing

"nothing was done or said to prevent any other nominations." The learned Judge (after referring to *Rex v. Monday* (a) and *Rex v. Player* (b)) stated to the jury, as his opinion, that the mode of proposing the names was improper, and the election void. Verdict for the Crown. Sir J. Campbell, Attorney-General, in the ensuing term obtained a rule to shew cause why a verdict should not be entered for the defendant (leave having been reserved so to move), or a new trial had. In *Hilary* term 1839 (c),

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Sir W. W. Follett, Kelly, and O'Malley shewed cause. The only question is whether, on an election of aldermen, the proposing of names in a batch be correct or not. Stat. 7 W. 4. & 1 Vict. c. 78. s. 14. gives a direction on this subject prospectively: but stat. 5 & 6 W. 4. c. 76. s. 25., the only enactment in force as to such elections at the time in question, furnished no regulation; the case must therefore be decided by the ordinary rules of corporation law. The practice here adopted is in itself not reasonable: for, when sixteen names are put up together, a person who wishes to elect one particular candidate is compelled to vote for fifteen whom he may not approve of. There is no opportunity for the electors to exercise a judgment or declare an option respecting individual candidates, as on elections to parliament: no opinion is taken as to any one. If the list is adopted unanimously, the unanimity may be only apparent. The authorities support this objection. In *Rex v. Monday* (a) Lord Mansfield disapproved of

(a) 2 Comp. 530.

(b) 2 B. & Ald. 707.

(c) January 26th. Before Lord Denman C. J., Littledale, Williams, and Coleridge Js.

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seven candidates at once being proposed for the office of alderman; and in *Rex v. Player* (a), where the common council of *Gloucester* admitted seventy-nine persons to be honorary freemen of the city by one vote, this Court referring to *Rex v. Monday* (b), granted a *quo warranto* for information. Those cases are still law, where the local acts have not introduced any special provision.

Sir *J. Campbell*, Attorney-General, *B. Andre Palmer*, and *Byles*, contra. The mode here adopted is the preferable one, where a given number of officers is to be elected in a given day. In *Rex v. Player* the election was not for the purpose of filling vacancies but of adding to an indefinite body of honorary freemen; there was no inconvenience, therefore, in electing them separately; and, as no one could be chosen if a member of the common council dissented, it was proposed that each should be proposed apart. Here sixty aldermen were to be elected on the 31st of *December*, forty-eight councillors. Every one might have sixty candidates to propose: must there then be 768 proposals? The argument for the Crown is, that each individual must be voted for by a majority of the electors present; but that might never happen to any candidate if there were three parties in the council, nearly balanced [Lord *Denman* C. J. The same observation would apply to lists.] Any one of the electors here may be voted for any one of the candidates; and it must be supposed that in assenting to the lists they did so for the several persons named in them, as if each

(a) 2 B. & Ald. 707.

(b) 2 Cowp. 590.

name had been repeated. Where the vote is to be in the affirmative or negative, the names must be proposed singly; but, where the choice is to be exercised merely by nomination of one in preference to another, the elector may vote for several at once; and this is the case in elections of members of parliament where more than one are to be returned. Nothing was done or said here to prevent any elector from offering an additional list. In *Rex v. Monday* (a) the defendant was not elected, because there was a majority of votes against the list proposed, in which his name was. The remarks of Lord Mansfield, as to the mode of proposing the names, were made obiter, and are not applicable to the case where a certain number of vacancies must be filled up on a given day. [Lord Denman C. J. We will consider of this case, and shall be careful in the decision, if it be only to lay down a rule for other cases which are not within the act, 7 W. 4. & 1 Vict. c. 78.]

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Cur. adv. vult.

Lord DENMAN C. J., in this term (June 6th), delivered the judgment of the Court.

On the trial of this quo warranto before Mr. Justice Park, the objection to the defendant's title was, that the mayor had proposed to the elective body a list of sixteen persons given in by an elector, that being the number of vacancies then to be filled up, offering at the same time to receive any list of sixteen or a less number that any elector might propose, but refusing to take the votes of the whole assembly on each particular candidate,

(a) 2 Cowp. 530.

The

1839. The learned Judge thought that the rule laid down in *Rex v. Monday* (a) and *Rex v. Player* (b) ought to have been followed, and directed a verdict for the Crown, but with leave for the defendant to move that the verdict be entered for him, if the Court should not take the same view of the law.

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That rule was properly applied where an indefinite number of honorary freemen was to be elected. The reason is obvious. In that case the claim of each is essentially distinct, and his individual fitness or unfitness is alone to be determined. This cannot be done when electors are required to vote for or against many candidates at once. They may think it so desirable that *A.* should be a member of the corporation, from respect and confidence in him, that his election would be cheaply purchased by receiving *B.* and *C.*, both of whom they may deem wholly unfit for the office; or, on the other hand, may think him so highly objectionable, that it is better to exclude a long list of well qualified persons than permit him to come among them. Every thing would, therefore, unavoidably run into bargain and compromise, where they would be obviously unnecessary and improper, and even inconsistent with the direct purpose of such an election, which need not take place at all, and which calls on the electors to exercise no other judgment than on the competency of each individual proposed.

But it seems to us that, when a certain number of persons is to be elected as an official body, that very principle is the only one that can reasonably be acted on. I may consider *A.* perfectly fit for one of the

(a) 2 *Cowp.* 530.

(b) 2 *B. & Ald.* 707.

places

places to be filled, provided only that *B.* or *C.* should **occupy** another of them. The point on which the voter **must** exercise his judgment is, not whether *A.* would **be** a good alderman, but whether *A.* and others would **form** a good board of aldermen. The proposer of the **list** lays it before the assembly, as the board which he **recommends**. Each elector had the opportunity of **proposing** his own board, or each those persons who **ought**, in his opinion, to be elected at all events, **what-**
ever others may find a seat there.

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The defendant's counsel contended that by taking the votes for individuals singly the purpose of the election might be wholly defeated, as there might be no majority in favour of any one, though there was one in favour of the definite number. But it is possible that there might be an equality of votes for two or any other number of the candidates in the list; the probability is less, but that is all.

On the part of the Crown it was also asserted that the nomination and election of a member of parliament, the most solemn form of election known to our law, proceeds always on the single handed rule. This is hardly true as a practical proposition: for, though the nomination is separate, and the shew of hands taken on each, which may be final, it is not necessarily final. The freeholder who nominates *A.*, in hopes that *B.* will be his colleague, is free to ask for a poll, and vote against *A.* if he sees that *B.* cannot succeed, and that *A.*'s colleague will neutralize *A.*'s services, or make him an objectionable member. If the election is decided by the poll, every voter has the power of giving in his list, and does give it in, by voting for four, three, two, or

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only one, if he thinks proper. This is precisely
was done in the election from which this quo war
arose.

The number of votes so taken affords a true mea
of the confidence reposed in each and all the candi
by the whole body of voters.

The act of 7 *W. 4.* & 1 *Vict. c. 78.*, which rec
the royal assent in *July* 1837, was passed after this
tion, and after this rule was obtained : it cannot tl
fore, as a matter of law, regulate what was then c
But the mode of election there enjoined by the l
lature, to be observed hereafter and permanently, ca
be considered as opposed to the sound general princ
for conducting similar elections : and the fourteenth
tion makes the general law for the future in exact
formity with the practice observed when this defen
was elected.

Rule abso

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The QUEEN against The Lords Commissioners *Thursday,*
of Her Majesty's Treasury. *May 23d.*

(In the Matter of LOXDALE.)

IN last *Hilary* term, Sir *W. W. Follett* obtained a rule to shew cause why a mandamus should not issue, commanding the Lords Commissioners of Her Majesty's Treasury "to hear and determine the merits of the appeal of *James Loxdale* on his claim to compensation for the loss of all the emoluments of his office of common clerk of the borough of *Shrewsbury* in the county of *Salop.*" The affidavit on which the rule was obtained recited the governing charter, 14 *Car.* 1., which directed that there should be "one honest and proper man, skilled in the law," who should be called "common clerk" of the town, and who, by himself or deputy, should write and make all recognisances to be taken before the mayor or other justices within the town, and should transcribe the same and all laws and ordinances, &c., ordained by the mayor, aldermen, and assistants, and all proceedings and acts of the court at the sessions of the peace held for the town; and should make, write, and enroll all pleadings, &c., and acts of court in the court of record in the same town, and in the other

The "common clerk" of a borough, before 5 & 6 *W.* 4. c. 76. (Municipal Corporation Act), had always executed, by himself or deputy, the offices of clerk of the peace and clerk of the justices, as incidental to that of common clerk. The first town council, elected after that act, appointed him to the office of "town clerk," which he declined to accept, on the ground that the office was essentially a different one; and he claimed compensation as upon a loss of the entire office of common clerk. The council refused any compensation; and the Lords of the Treasury, on appeal and hearing of all parties, decided that, as he was re-elected town clerk, he was not entitled to compensation for such part of his emoluments as appertained to that office; but, as he was not re-elected to the offices of clerk of the peace or clerk of the magistrates, he was entitled to compensation for the emoluments of the common clerk acting as clerk of the peace and to the justices; and they awarded to him an annuity "for the loss of his office of common clerk." Held, that the Lords had sufficiently adjudicated on the whole subject of appeal: and the Court refused a mandamus to them to hear and determine the merits of it.

If the Lords have in fact heard and determined an appeal under sect. 66 of the act, this Court will not interfere by mandamus, though it may be satisfied that compensation has been awarded on an erroneous principle.

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courts held there; and should make all writings & muniments concerning the mayor, &c., in right of town; and do and execute all other things belong to the office of common clerk. The office was continue till death or resignation; and there was power given to the recorder, steward, and common clerk to appoint deputies respectively during pleasure. The claimant, who was a barrister, was elected to office of common clerk in *September* 1833, and appointed under the common seal. He continued to fill the office till the passing of the Municipal Corporation Act, 5 & 6 W. 4. c. 76., when the town council ordered "James Loxdale, Esquire, be re-appointed town clerk of the said borough; but he declined to accept of the office. The town council thereupon elected another to that office, and also appointed a Clerk of the Peace. The borough justices also appointed a clerk to the justices. These offices had been always theretofore executed by the common clerk or his deputy. In *April* 1836, Mr. Loxdale delivered a statement to the council claiming to be compensated for the whole amount of the emoluments of his late office (without deducting the value of those which appertained exclusively to the office of town clerk), on the ground that the new council was essentially different from the old one of common clerk, and that the latter was in effect abolished. The council disallowed the whole of this claim. Mr. Loxdale then appealed to the Lords of the Treasury, to whom he submitted a memorial: the town council replied to it: the claimant transmitted to the Lords his observations on the reply. He was then called upon by the Lords of the Treasury to furnish a statement of the different heads of receipt, so as to distinguish in what character

on what account he received each. This statement was accordingly furnished, and was sent by the Lords of the Treasury to the town council for their observations, which were again submitted to the claimant for his reply. On 18th *January* 1839, the following Treasury minute, dated 11th *January*, containing the award of the Lords, was notified to him.

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“Read several papers on the appeal of Mr. *Loxdale*, late common clerk of the borough of *Shrewsbury*.

“Read the opinion of the law officers of the crown, whom my lords considered it necessary to consult on the case.

“Read minutes of this board on the subject of compensation to town clerk of the 10th *September* 1835.

“Upon a full consideration of the papers before them, and the opinion of the law officers of the crown, my lords consider that, as Mr. *Loxdale* was re-elected to the office of town clerk, he is not entitled to compensation for such part of his emoluments as appertained to the office of town clerk; but that, as he was not re-elected to the office of clerk of the peace, or clerk to the magistrates, he is fairly entitled to compensation for the loss of the emoluments he would have lost, although he had continued as town clerk when re-elected, and which were received by the common clerk acting as clerk of the peace and clerk to the justices. Having before them the account furnished by Mr. *Loxdale*, my Lords are pleased to award to him an annuity of 120*l.* per annum, as compensation for the loss of his office of common clerk, such compensation to commence from 6th *May* 1836, and to continue for his life.”

It further appeared that the limits of the borough had been greatly contracted by the Municipal Corporation.

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ration Act, and that the business incident to the office of town clerk had been consequently much diminished.

On the part of the corporation, it was stated that there was no distinction between the offices of town clerk and common clerk, but that it had been called and known as well by one as the other name; and numerous entries in the corporation records were produced, in which the former name was used: that the claimant had constantly called and signed himself "town clerk;" and that he had refused to furnish to the town council separate accounts of the emoluments attached to each function of his office. Other facts were also stated upon the merits, to which it is not necessary to advert.

Sir *John Campbell*, Attorney-General, Sir *Frederick Pollock*, *Wightman*, and *Austin*, shewed cause. The decision of the Lords of the Treasury is a right one. At all events, if they have regularly heard and determined the appeal, the decision is final, and cannot be reviewed by this Court. The office of common clerk and of town clerk are identical; the act has only altered its tenure, and deprived it of some emoluments formerly incidental to it. It is indeed true that it can no longer be executed by deputy; but this, and the other alterations, are only "circumstances" (sect. 66) to be considered in awarding the compensation. If the office is a new one, then Mr. *Lordale* might have accepted it, and yet claimed compensation for the whole of the lost office; which will hardly be said. The appellant claims for the loss of *all* his emoluments; whereas, having refused to accept the office of town clerk, the act has provided for him no compensation in respect of that office; but, as the two other appurtenant offices were, at all events, lost to him, whether he continued in the office

office of town clerk or not, compensation has been awarded in respect of them. *Rex v. The Mayor, &c., of Bridgewater* (a) supports the decision. There the common clerk was re-appointed town clerk; and the compensation was "limited to those emoluments which were received for duties subordinate and incidental to the old office:" per *Coleridge J. ibid.* At all events it appears that the Lords Commissioners have heard and determined the case; and the minute expressly gives compensation for the office of "common clerk," just as if that office had, in fact, been abolished. It has, indeed, been said by the Court that there must be some way of reviewing such decision. [Lord *Denman C.J.* We have not exactly laid that down. We said there might be cases in which we might be able to do so (b).] The inconvenience of interference will be very great. The object of the act, which (sect. 66) makes the order "binding on all parties," can hardly be satisfied, unless the Lords can determine both law and fact. They cannot direct an issue, nor take the opinion of a court.

Cresswell, E. V. Williams, and L. Peel, contra. The office to which Mr. *Lordale* was appointed is a new one. In *Rex v. The Mayor, &c., of Bridgewater* (a) *Coleridge J.* so describes an office in a similar case. It is like the Common Clerkship of *Bristol*, where the charters require a barrister to be appointed (c). It would be absurd to suppose that the burden of compensation could, in that

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(a) 6 A. & E. 339.

(b) See *Ex parte Lee*, 7 A. & E. 139.; *Regina v. Mayor, &c., of Norwich*, 8 A. & E. 633, 637.; *Regina v. Lords of the Treasury* (In the Matter of Tibbits), post.

(c) See the *Bristol* charters of 36 Car. 2. and 9 Ann. *Seyer's Bristol Charters*, pp. 276, 307. (4to 1812). See *Appendix to the First Report of the English Municipal Corporation Commissioners*, Part II. pp. 1160, 1165, 1166.

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case, be avoided by appointing the barrister to the new office of town clerk, of which the duties are now inconsistent with the practice of his profession. So here the charter requires a person "skilled in the law," to be appointed, which has been usually construed to mean a barrister. The re-election was a mere device to deprive the party of compensation for an office which was, at most, only nominally the same. The duties of common clerk are specified in the charter, and they include duties which do not usually devolve on a town clerk. If the claimant had united three distinct offices, then there would have been some ground for giving a partial compensation for one or two of them: but here it was one entire office, and no part could be separately resigned or granted. Two of the incidental duties, viz. those of clerk of the peace and clerk of the justices, have become incompatible by the provision of the act itself; sect. 109. It is therefore impossible to re-elect to the old office [*Littledale J.* If he had accepted the same office with twice the duty and half the profit, could he have demanded compensation?] The proper course, to entitle him to compensation, is to refuse it. The power of the Lords to make such order as to them "shall seem just" will not authorise them to make one at variance with the intent of the act, which is, obviously, to give compensation for every lost office. Here they have only compensated for the loss of part of it; and this on the ground that the party has been offered an office involving *some* of the duties of the old one. It may be conceded that, if they had awarded the compensation to be paid as upon a loss of the whole office, the award would have bound all parties; but, though the minute professes in terms to do this, it is evident that the office of "town clerk" only is meant. The names of
 office

office are there treated as synonymous, otherwise it would be self-contradictory. Either they have given compensation for the whole, which is repugnant to the admission on the other side that he has received, and was only entitled to, compensation for part; or they have awarded compensation for part only, in which case they have not exercised their jurisdiction by making any award of compensation in respect of the rest. In effect, they have only in part decided, and may therefore be compelled to rehear and decide as to the whole. In *The Attorney General v. The Corporation of Poole* (a) Lord Cottenham's language suggests a doubt whether the reappointment must not be accepted, as well as granted, in order to deprive the party of his right to compensation. [Patteson J. Your argument goes to this extent; that, if the office of town clerk had been accepted, even with a higher salary, Mr. Lordale might still have had compensation for all.]

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day in this term (*Monday, 27th May*), delivered the judgment of the Court.

This was an application by Mr. Lordale, late common clerk of the town of *Shrewsbury*, for a mandamus to be directed to the Lords Commissioners of the Treasury, commanding them to hear his statement of the loss sustained by him by reason of being deprived of his said office of "common clerk," and to award him a compensation for such loss. [His lordship, after stating the reappointment of Mr. Lordale, his refusal to accept the office of town clerk, the disallowance of compensation by the town council, his appeal, and the

(a) 4 *Myl. & Cr.* 24.

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Treasury minute, as above, proceeded as follows.] It is upon the form of this minute that the application for a mandamus has been chiefly founded; it having been contended that it clearly appears therefrom that Mr. Lordale's claim, or at least *a portion of it*, was never heard or considered *at all*. And that is the real question; because it was properly conceded in the argument (by analogy to the course uniformly pursued by the Court in awarding or refusing the writ of mandamus to justices, &c.) that, if the lords did hear and consider the case, a mandamus ought not to go, even if the Court should be satisfied that the compensation had been awarded upon an erroneous and mistaken principle.

The language of the 66th section, as to the manner of making compensation by the council, is, that an adequate compensation is to be assessed by the council for the salary, fees, and emoluments which the person shall so cease to hold, regard being had to the manner of his appointment to the said office, and his term or interest therein, *and all other circumstances of the case*; and, as to the appeal, that a person thinking himself aggrieved may appeal to the Lords of the Treasury, who shall thereupon make such order as to them shall seem just, and such order shall be binding upon all parties. And we think that it must be understood that the appeal is to be conducted upon the same principle as the original hearing before the council, *with regard to all the circumstances of the case*.

The most favourable view of the subject for the applicant we presume to be, to *suppose* that the office of common clerk has been abolished, because that was contended for by his counsel, though we beg to be understood as expressing no such opinion. Supposing
 however

however, that to be so, what is the fair import of the Treasury minute? We think it is quite apparent that the Lords were considering the value of *the lost office*, because (what they, obviously, deemed to be) its component parts are analysed; and those were, clerk of the peace, clerk of the justices, and town clerk. For the two former, which they treated as lost, and under circumstances to call for compensation, they awarded the above-mentioned annuity; but for the latter, nothing; and give as a reason, that he might have had the office of town clerk, if he had chosen. This, therefore, seems clearly to shew that the Lords of the Treasury had the lost office (and all the parts of it) full under their notice. Suppose one part of the emoluments of the common clerk to have been a house of the value of 100*l.* per annum, and that, upon the change, the same house had been offered to him, which, for some reason, he had refused, could it possibly have been contended that such refusal was not a *circumstance* for the consideration of the Lords of the Treasury? And yet what is the material distinction? But we forbear to follow the investigation of the *principle* of the decision, the only question being, whether the Lords have heard and decided *at all*, because, if they have, that decision is, by the act, expressly declared to be final. The fallacy seems to be in inferring that, *because* nothing is allowed to the applicant in respect to that part of his former duty, which they designate as the *town clerk's*, *therefore* his claim has never been under consideration by the Lords of the Treasury at all. We, however, have arrived at a contrary conclusion; and the consequence is, that the rule must be discharged.

Rule discharged.

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against
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Thursday,
May 23d.

NORRIS *against* SMITH.

Where a clause in a statute (50 G. 3. c. cxlix. s. 105., local and personal, public) required thirty days' notice of action for anything done in pursuance of it, and enabled the party complained of to tender amends for any irregularity: Held, that a letter written to the defendant, who justified under the act, requesting him to communicate the names of certain parties, and stating that, unless the request was complied with, the plaintiff would "take proceedings against him accordingly," was an insufficient notice within the statute.

The act authorised trustees, upon complaint of any inhabitant, and "due investigation," to order "any pigstye, necessary, or nuisance," in or near the streets, &c., to be removed within seven days after notice in writing to the occupier of the premises wherein such nuisance was situate. The trustees issued such a notice to the plaintiff, imputing that he kept a brothel, and ordering him to discontinue such nuisance. Plaintiff thereupon brought an action, as for a libel, against the clerk who signed the notice: Held, that he was entitled to notice of action under the above clause, although it did not appear that there had been either complaint or investigation before the issuing of the order.

Semble, a brothel is a nuisance within the meaning of such an enactment, per Lord Denman C. J., at *Nisi Prius*.

CASE for a libel, imputing to plaintiff that he kept a disorderly house, to the common nuisance, &c. Plea: Not Guilty (by statute).

The cause was tried at the sittings in *Middlesex* after last *Easter* term, before the Lord Chief Justice. The alleged libel was contained in a notice, signed by defendant as clerk of the trustees under stat. 50 G. 3. c. cxlix. (Local and Personal, Public), for lighting, watching, &c., the streets in the parish of *St. Luke, Middlesex*, and left at the plaintiff's dwelling-house. It purported to be a notice under sect. 105 (a) of the statute, reciting a complaint

(a) Sect. 105, is as follows: "In case, in any part or parts of the said parish, any hogstye, necessary-house, or nuisance shall be in or near any of the streets, squares, ways, roads, lanes, courts, passages, or public places within the said parish, it shall be lawful for the said trustees, upon complaint thereof to them made by any such inhabitant, and after due investigation of such complaint, by notice in writing under the hand or hands of their clerk or clerks for the time being, to order that any and every nuisance or nuisances, offence or offences, shall be forthwith remedied or removed, and if the same shall not be remedied or removed within seven days after such notice given to the owner or owners, occupier or occupiers, of the premises wherein such nuisances shall be situate, or left for him or them at his or their last or usual place or places

complaint to the trustees against plaintiff for keeping a brothel frequented by persons of ill fame of both sexes; and requiring him forthwith to abate and discontinue such nuisance, otherwise that the trustees would proceed to cause him to be indicted, in pursuance of the statutes in that behalf. More than thirty days before the commencement of the action, plaintiff's attorney wrote the following letter to defendant.

35. *Castle Street, Holborn*, 4th August 1838.

Sir,—I am directed by Mr. John Norris of *P. Street* to request you will forthwith give up the names of the person or persons said to have made a complaint to the trustees for lighting &c. the parish of *St. Luke*, and upon which you did, on the 23d July last, serve Mr. Norris with a notice charging him with keeping a disorderly house &c.; and, unless you do, Mr. Norris will consider you the author of such notice (which I conceive to be libellous), and will take proceedings against you accordingly. Probably you will favour me with the names of the gentlemen, said to be trustees, who, in your company and presence, forcibly entered Mr. Norris's house. An answer is requested.

I am, Sir,

W. H.

Places of abode, it shall and may be lawful to and for the said trustees to indict, or cause to be indicted, such person or persons so neglecting or disobeying such notice or notices, at the next general or quarter sessions of the peace for the county of *Middlesex*, for such nuisance or nuisances; and such person or persons being found guilty thereof, such nuisance or nuisances shall or may be removed, taken down, and abated, according to law with regard to public or common nuisances." There is a similar provision in the Metropolis Paving Act, 57 G. 3. c. xxix. s. 67. (local and personal, public), which was also relied upon by the trustees, but of which no notice was taken in the argument.

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To this letter defendant returned for answer that he would "be happy to receive any proceedings" which plaintiff might be advised to take against him, but declined to give the names, alleging that he did not know who they were, and, if he did, would not communicate their names. No complaint to, nor investigation by, the trustees, previous to the above notice, was proved on the part of defendant. It was objected that a notice, issued under the above circumstances, was not actionable; and that no notice of action had been given as required by the statute (a). On the other side, it was contended

(a) *Beechey v. Sides*, 9 B. & C. 806. was cited. See *Lidster v. Borrow* 9 A. & E. 654., and the cases there cited. The following sections of the act were referred to.

Sect. 170. "No plaintiff or plaintiffs shall recover in any action to be commenced against any person or persons for any thing done in pursuance of this act, unless notice in writing of such intended action shall have been given to the clerk or clerks of the said trustees, or left at his or their law or usual place or places of abode, twenty-one days before such action shall be commenced, signed by the attorney for the intended plaintiff or plaintiffs, specifying the cause or causes of such action; nor shall any plaintiff or plaintiffs recover in such action for satisfaction for special damage or otherwise, or for any such irregularity, trespass, or other proceedings, if tender of sufficient amends shall be made by or on the behalf of the party or parties who shall have committed, or cause to be committed, every or any such irregularity, trespass, or wrongful proceeding, before such action shall be brought," &c.

Sect. 173. "No action or suit shall be commenced against any person or persons for any thing done in pursuance of this act, until after thirty days' notice in writing shall be thereof given to the clerk or clerks to the said trustees, or after sufficient satisfaction made or tendered, or after six calendar months next after the fact committed, for which such action or actions, suit or suits, shall be so brought; and all such actions or suits shall be laid and tried in the county of *Middlesex*, or city of *London*, and not in any other county, city, or place; and that the defendant or defendants in such action or actions, suit and suits, and every of them, may plead the general issue, and give this act, and the special matter, in evidence, at any trial or trials which shall be had thereupon; and that the matter or thing for or on which such action or actions, suit or suits, shall be brought was done in pursuance, and by the authority, of this act; and if the said matter

contended that the act did not apply to nuisances of the kind mentioned in the supposed libel: that the letter of plaintiff's attorney was a sufficient notice; and that there was strong evidence of want of bona fides in the proceeding of the trustees. The Lord Chief Justice was of opinion that the statute applied to nuisances of this kind, and directed the jury to find for the defendant on the ground that there was no sufficient notice of action, with liberty to move to enter a verdict for plaintiff, with nominal damages.

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Eric now moved to enter a verdict for the plaintiff. The defendant, who relies on the order of the trustees, must stand in their place, and cannot justify, because they could not have justified. There was no complaint, nor any investigation by them before they issued the notice. [Lord *Denman* C. J. I held that the order, though it might be irregular, was, at all events, sufficient to entitle the defendant to notice of action.] The letter

matter or thing shall appear to have been so done, or if it shall appear that such action or suit was brought before *twenty-one days' notice* was given as before directed, or that sufficient satisfaction was made or tendered or paid into court as aforesaid, or if any such action or suit shall not be commenced within the time before for that purpose limited, or shall be laid in any other county, city, or place than as aforesaid, then the jury shall find for the defendant or defendants therein; and if a verdict shall be found for such defendant or defendants, or if the plaintiff or plaintiffs in such action or actions, suit or suits, shall become nonsuited, or suffer a discontinuance of such action or actions, suit or suits, or if upon a demurrer or demurrers in such action or actions, suit or suits, judgment shall be given for the defendant or defendants therein; then, and in either of the cases aforesaid, such defendant or defendants shall have treble costs, and shall have such remedy and remedies for recovering the same, as any defendant or defendants may have for the recovery of his, her, or their costs in other cases by law."

Whether twenty one, or thirty, days' notice was necessary, was a question which the Court adverted to, but found it unnecessary to determine.

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 NORRIS
 against
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by the plaintiff's attorney on 4th *August* was a sufficient notice. The act does not require such particularity in the notice as stat. 24 G. 2. c. 44. s. 1. does in the case of justices, but merely a general notice of action.

LITLEDALE J. The notice required is certainly not so particular as is necessary in proceeding against magistrates; but this notice is insufficient. In *Lewis v. Smith (a)* a letter, notifying the party's intention "to take legal measures" if certain goods were not delivered forthwith, was held insufficient by C. J. Gibbs under a similar provision. The refusal to give up the names should have been followed by a distinct notice of action, to which the defendant, who stands in the situation of the trustees in this respect, is clearly entitled, where the act complained of was done bonâ fide.

PATTERSON J. The order issued by the trustees professed to be a proceeding under the act; and there is enough to shew that it was taken bonâ fide in pursuance of the act. The defendant was therefore entitled to a proper notice. Here the letter was sent without reference to the statute. It is only a conditional notice, not an absolute one; and it makes no allusion to the period of time at the end of which an action is to be commenced, and during which the defendant is to have an opportunity of tendering amends.

WILLIAMS J. The question is, not whether the defendant and the trustees were strictly justified by the provisions of the statute, but whether there was a semblance of acting under it. If there was, the defend-

(a) *Hob. N. P. C. 27.*

ant is entitled to such a notice as will induce him to tender
amends, where the act has not been strictly pursued.

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Lord DENMAN C. J. concurred.

Rule refused.

OWSTON *against* COATES.

Thursday,
May 23d.

IN Easter term last, *Cresswell* obtained a rule nisi that
defendant should be at liberty to render himself in
discharge of his sureties given under 1 & 2 Vict. c. 110.
s. 8. (a), and that, in the mean time, proceedings should
be stayed.

The sureties
given by a
trader under
sect. 8 of stat.
1 & 2 Vict.
c. 110. (for
abolition of ar-
rest on mesne
process) may
discharge
themselves by
a tender of
their principal
after verdict
against him,
and before judgment.

The following facts appeared on affidavit. Defend-
ant, being arrested on a capias, put in bail *July* 1838.
On 3d December an exoneretur was entered under

(a) Sect. 8 enacts, that if a creditor of a trader (to a certain amount)
shall file an affidavit in the Court of Bankruptcy, that his debt is justly
due, and that his debtor is a trader, and shall serve him personally with a
copy and with notice in writing requiring immediate payment, "and if
such trader shall not within twenty-one days after personal service of such
affidavit or affidavits and notice pay such debt or debts, or secure or com-
pound for the same to the satisfaction of such creditor or creditors, or enter
into a bond, in such sum and with such two sufficient sureties as a com-
missioner of the Court of Bankruptcy shall approve of, to pay such sum or
sums as shall be recovered in any action or actions which shall have been
brought or shall thereafter be brought for the recovery of the same, together
with such costs as shall be given in the same, or to render himself to the
custody of the gaoler of the court in which such action shall have been or
may be brought according to the practice of such Court, or within such
time, and in such manner as the said Court or any judge thereof shall
direct, after judgment shall have been recovered in such action, every
such trader shall be deemed to have committed an act of bankruptcy on
the twenty-second day after service of such affidavit or affidavits and
notice, provided a fiat in bankruptcy shall issue against such trader within
two calendar months from the filing of such affidavit or affidavits, but not
otherwise."

the

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the seventh section of the above act. On 8th *December* plaintiff served defendant with a copy of affidavit and notice in writing, agreeably to the statute, requiring the payment of 4000*l.*, the amount for which he has been arrested; whereupon defendant procured two sureties to join him in a bond of which the following was the condition. "If the above bounden *Thomas Coates* shall pay such sum or sums of money as shall be recovered in the said action so brought by the said company in the name of the said *Thomas Owston*, as such trustee as aforesaid, against the above bounden *Thomas Coates*, for the recovery of the said alleged debt, together with such costs as shall be given in the same, or shall render himself to the custody of the marshal of the marshalsea of the Court of Queen's Bench, being the gaoler of the Court in which the said action hath been brought and is now depending as aforesaid, according to the practice of such Court, or within such time and in such manner as the said Court or any Judge thereof shall direct after judgment shall have been recovered in such action, then the present obligation shall be void" &c. At the following Spring assizes plaintiff obtained a verdict for 2500*l.*, on which judgment had not been entered up. Defendant, having become a bankrupt, and being desirous of relieving his sureties, then applied to a Judge at chambers for leave to put in bail, that he might render "according to the practice of the Court;" but his Lordship, being of opinion that it could not be done under the act till after judgment, refused to allow it; upon which the present motion was made. In last *Easter* term (a),

(a) *Wednesday, 8th May. 1839. Before Lord Denman C. J., Little-
dale, Patteson, and Coleridge Js.*

Joseph

Joseph Addison shewed cause. The only render known to the practice of the Court is by bail; and that alone must have been in the contemplation of the act. Sect. 3, &c., shews that all arrest on mesne process is not taken away. The cases in which the Court gives time for render by bail account for the words used in sect. 8; *Glendining v. Robinson* (a), *Winstanley v. Gait-skill* (b). Bail alone can render, in which respect bail differs from mainprize; *Bac. Ab. Bail in Civil Causes* (c). Even if the defendant were rendered, the marshal would have no power to keep him; for he will not be in custody under any writ, and, the exoneretur being entered, it is as if there had never been bail. The case is analogous to that of bail in error, who cannot render; or to the old provisions for proceeding against debtors being members of parliament, especially the repealed stat. 4 G. 3. c. 33.; except that there is, in the act last mentioned, no alternative to pay or render, as in stat. 1 & 2 Vict. c. 110. s. 8. The intention of the act was to give the power only where the existing practice of the Court recognises it. At all events the sureties can have no relief till after judgment, by the express words of the clause.

Cresswell, contra. The sureties are not like mainpernors, nor like sureties in bankruptcy, who are in the nature of mainpernors, and give security to pay but not to render; stat. 6 G. 4. c. 16. s. 10. The analogy is rather to the recognizance given on reversing outlawry. If there be no subsisting practice by which the render can be effected, the Court must now establish it; otherwise

(a) 1 *Trunt.* 320.

(b) 16 *East*, 389.

(c) Vol. i. page 441. (7th ed.); where an *Anonymous case*, 6 *Mod.* 231., and 4 *Inst.* 180., are cited.

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the party cannot do that which, it is evident, the legislature meant to be done. The right to establish, alter or suspend general rules of practice, is constantly exercised. If the Court has no power according to present practice, it may, under the latter part of the clause, direct *now*, when and how the render shall be made *after judgment*. [*Patteson J.* You apply the words "after judgment" to the time of render, and not to the time of making the rule.]

Cur. adv. v.

LORD DENMAN C. J. now delivered the judgment of the Court. This was a motion by persons, who had given bond under the eighth section of stat. 1 & 2 *Vict. c. 11* to be allowed to render their principal after verdict against him and before judgment. The condition of the bond, as required by the act, is to pay the condemnation money or render the defendant according to the practice of the Court. Now the practice of the Court as to render, applies only to cases when a defendant is at large upon bail, and, when rendered, the defendant is in custody under the writ upon which he was originally taken. In the present case there is no such writ, nor any bail; but we think that, in order to give effect to the act of parliament, we must construe it to have placed the defendant, who has found sureties by bond under the eighth section, in the same situation as if he had been arrested and given bail, and to have treated the obligation in the bond as bail in the action.

The rule of Court for the render, or order of a Judge for the same purpose, will then be sufficient authority by virtue of the eighth section of the act, for the detention; and the obvious intention of the legislature will be carried into effect.

Soi

Some doubt existed as to the words "after judgment" in the eighth section, namely, whether they apply to the whole preceding matter or not: as to which we think that, at all events, they do not apply to a render "according to the practice of such Court;" and as bail would, by that practice, have been at liberty to render a defendant after verdict and before judgment, we think that the obligors in this bond must be at liberty to do the same. The rule, therefore, will be made absolute.

1839.

OWSTON
against
COATES.

Rule absolute.

DOE on the demise of OXENDEN against
CROPPER.

Friday,
May 24th.

FROM the affidavits in this case it appeared that the ejectment was brought to recover a close called *Little Becks*, and also the house and land which were the subject of the two following agreements, and for no other lands &c.

By memorandum of agreement, dated *July 8th, 1831*, between *Cropper* and *Oxenden*, *Cropper* agreed to let, and *Oxenden* to take, at a certain rent, the house and land therein mentioned, for three years from *13th May* then last, with liberty to *Oxenden* to continue the possession for five or seven years, on stating his determination so to do, in writing, six months before the expiration of the three years. By memorandum of agreement,

An ejectment, brought for close *A.* and close *B.*, was referred at Nisi Prius to an arbitrator, together with an action for trespass upon close *B.*, brought by the lessor of the plaintiff against the same defendant. In the action of trespass there were special pleas justifying on the ground of title to close *B.* in defendant. The arbitrator

ordered a verdict on all the issues in trespass for the defendant, except one issue on a plea of Not Guilty: but he ordered a general verdict for the plaintiff in the ejectment. By a paper which he delivered with the award, stating his reasons, it appeared that he considered that the lessor of the plaintiff had no title to close *B.*

Held that, though there appeared a repugnancy, the *postea* in the ejectment could not be amended by confining it to close *A.*, and that the lessor of the plaintiff was entitled to retain the general verdict.

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DOE dem.
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dated *May* 14th, 1832, between the same parties, *Cropper* agreed to sell and *Oxenden* to purchase the same house and land at a price named.

Little Becks formed no part of the property mentioned in the two agreements, but had been let by *Cropper* to *Oxenden* in *May* 1833. *Cropper* retook possession of *Little Becks* about *March* 1834: and, *Oxenden* having failed to complete the purchase contracted for by the agreement of *May* 1832, *Cropper* also entered into possession of the house and land which was the subject of that agreement, in *February* 1835.

For the entry in *February* 1835, *Oxenden* brought an action of trespass against *Cropper*; but, in that action, no claim whatever was made respecting *Little Becks*. *Cropper* pleaded several pleas of soil and freehold, as to the house and land, in himself and others; and, as to certain property therein, he pleaded property in himself and others; and also, to the whole declaration, Not Guilty. *Oxenden* replied, to the pleas of soil and freehold, a demise to him by *Cropper* of 14th *November* 1832, traversed the pleas of property, and joined issue on the plea of Not Guilty. *Cropper* traversed the demise, and joined issue on the traverse in the replication: and *Oxenden* joined issue on the traverse in the rejoinder.

The actions of ejectment and trespass came on to be tried at the *Lincolnshire* Summer assizes, 1837, before *Park J.*; when, by an order of *Nisi Prius*, it was ordered, by consent &c., that a juror should be withdrawn in the ejectment, and a verdict be entered for the plaintiff in *Oxenden v. Cropper* (the action of trespass) for 1000*l.* damages, subject to the award of a barrister, who should be at liberty to order and direct for whom and for what sum the verdict should be finally entered,

and

and to direct a verdict to be entered in the ejectment as he might think right; and he was to settle all matters in difference between the said parties in both causes, and to order and determine what he should think fit to be done by either party respecting the matters in dispute, who agreed to be bound and concluded by such determination: the costs of each cause to abide the event of the award, and the costs of the reference and all other costs to be in the discretion of the arbitrator. And, by the like consent, the defendant was, at all events, to retain possession of the premises in question, and Oxenden was to release all right and interest therein that he might have: and the arbitrator was to say what compensation, if any, was to be paid by the defendant to Oxenden in respect of any money he might have expended upon the premises agreed to be purchased by Oxenden of defendant.

The arbitrator made his award, the material part of which is as follows. "I do award," &c., "that a verdict be entered in the said first-mentioned cause, that is to say in the action of ejectment, for the plaintiff, with 1s. damages; and I do further award," &c., "that upon all the issues joined in the said last-mentioned cause, that is to say the action of trespass, except the issues joined on the last plea in the said last-mentioned cause, the verdict be finally entered for the defendant; and that, upon the issue joined on the said last plea, that is to say the plea of Not Guilty, the verdict be finally entered for the plaintiff. And I," "having duly heard and considered the claims made by the said *Henry Chudleigh Oxenden* upon the reference of all matters in difference, and particularly the claim made by him to compensation for money expended by him upon the

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above-mentioned premises at *Lacey*" (the subject of the agreement to purchase), "and also the claims made by the said *Robert Cropper* against the said *Henry Chudleigh Oxenden*, upon the reference of all matters in difference between the said last-mentioned parties," "do award," &c., "that nothing shall be paid by either of the said last-mentioned parties to the other of them in respect of such claims."

At the time of the award being taken up by the defendant, the arbitrator delivered to him a paper writing, of which the material part is as follows. "If either party should desire to know the grounds upon which I have proceeded in making my award, they are as follows. I am of opinion that, if, previous to the expiration of the agreement for three years in *May 1834*, the contract for the purchase had been put an end to, the parties, according to the doctrine in *Doe v. Stanion (a)*, would have been remitted to their original rights, and the tenancy would have revived and have continued until the expiration of the agreement; but that, when the agreement expired, nothing occurred upon which a new contract upon the terms of the old one for a tenancy from year to year could be implied. It was, I think, clear that neither party contemplated a tenancy from year to year from that time; and that *Mr. Oxenden* was permitted to continue in possession of the premises mentioned in the declaration in trespass solely on the footing of the proposed purchase; and that he was in the same situation as if he had then taken possession under the purchase contract. With respect to the *Little Becks*, I think there was fully sufficient evidence

(a) *Doe dem. Gray v. Stanion*, 1 *Mee & W.* 695. *S. C. Tyrwh.* & *Gr.* 1065.

of a tenancy from year to year, not determined by notice at the time the possession was resumed by the defendant; and that, consequently, *the ejectment might be maintained to recover the Little Becks*. I am of opinion that the purchase did not go off from any defect of title in, or default of, the defendant, but in consequence of the inability of the plaintiff to complete the purchase: and, under such circumstances, I am not aware of any rule of law or equity by which the defendant could be required to pay back money laid out upon the premises without his consent or privity." He then added other reasons, not material here, for his not allowing the expense of the improvement. It was deposed that the only points in dispute before the arbitrator, in the ejectment, were, whether the tenancy of *Little Becks* was from year to year, and whether it continued on the day of the demise, 4th February 1835, and whether *Oxenden* was tenant from year to year, or at will or sufferance, under the two agreements or otherwise.

The *postea* in the action of ejectment was entered Guilty, generally.

Whitehurst, on affidavit of the above facts, now moved that the *postea* might be amended by confining it to *Little Becks* (a). It is clear that the arbitrator considered the defendant entitled to the possession of all but *Little Becks*, both from the award as to the action of trespass, and from the language of the document

(a) He also moved that the Master should tax the costs for the defendant, or at any rate not for the plaintiff, as to all except *Little Becks*; but, it not appearing that any taxation had hitherto taken place, the Court said that they could not presume that the costs would be taxed erroneously; and that the motion was therefore so far premature.

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OXENDEN
against
CROFTER.

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OXENDEN
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which he delivered with the award. In ordinary cases of verdict, the Court has power to amend the postea according to the true intent of the jury: and, though this is usually done by the Judge who tries the cause, yet, strictly speaking, he is only a commissioner; the real power is in the Court. Then the same rule must be applied to cases where the postea is the result of an award. In *Kent v. Elstob* (a) the Court, discovering, from a paper delivered by the arbitrator, as he together with the award, that he had mistaken the land, set the award aside. *Sharman v. Bell* (b) may be cited for a contrary doctrine: but there the grounds of the arbitrator's decision were collected only from his conduct on the arbitration. But in a very late case, *Jo v. Corry* (c), where an arbitrator had stated his reasons verbally, after the publication of the award, in order to enable the parties to apply to the Court, the Court considering the reasons bad, set aside the award. The notion at one time prevailed that a plaintiff in ejectment if he proved his case for any part of the land, was entitled to a general verdict, though, at his own risk, was bound to confine the execution to the part for which he had proved. [Lord Denman C. J. A general verdict does not bind for all claimed: but, where the evidence confines the case to a part, the verdict may be for so much part.] In *Doe dem. Errington v. Errington* (d) Colridge J. said, "The action of ejectment in form complains of an unlawful ouster, usually from several messuages or closes, and the plea of not guilty puts in issue an ouster from any one of them. The issue is therefore, formally and substantially divisible. It

(a) 3 East, 13.

(b) 5 M. & S. 504.

(c) 5 New Cas. 187.

(d) 4 Dowl. P. C. 602.

very possible, that as to one or two messuages the ouster may be unlawful, and as to the residue lawful, and there is nothing to prevent a finding by the jury of such an ouster as to some or one of the messuages or closes, and negating it as to the residue." Here the question is very important as affecting the costs.

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DOE dem.
OXENDEN
against
CROPPER.

Humfrey shewed cause in the first instance. The arbitration rule gives the defendant the possession, at all events: so that nothing can be affected except the costs. *Doe dem. Bryant v. Wipple (a)* shews that, under a demise of the whole, an undivided moiety may be recovered. Here the award, if objectionable at all, must be so on the ground of repugnancy. (He was then stopped by the Court.)

LORD DENMAN C. J. There is an apparent repugnancy, on looking at the matters now brought before the Court; but you have a general verdict, and are entitled to keep it.

LITTLEDALE, PATTESON, and WILLIAMS, Js., concurred.

Rule refused.

(a) 1 *Exp.* 360.

1839.

Friday,
May 24th.

HALL *against* BUTLER and Another.

N., having no title to certain premises, let them by parol, and received rent. Afterwards another claimant, *B.*, demanded the rent; and *N.*, being satisfied with *B.*'s title, informed his tenant, in *B.*'s presence, that he had given up the premises to *B.*, who was now the landlord, and that the rent was thenceforth to be paid to *B.* The tenant acquiesced; and, when *B.* demanded the next quarter's rent, paid part of it on account. Held, that the tenant could not afterwards set up the title of a third claimant who had demanded rent, but had taken no step to eject him; no deception by any of the parties having been suggested.

REPLEVIN. Avowry for rent due from plaintiff as tenant to defendant, *Butler*. Plea, non tenui.

On the trial before the recorder of *Chester*, the defendants proved a will of *Joseph Butler* (whose heir defendant *Butler* was), dated 8th *August* 1783, by which he devised the premises in fee to his daughter *Elizabeth*, who afterwards married one *Nevitt*, and died in 1828 without having had issue. *Nevitt* continued to receive the rent after his wife's death; and plaintiff entered at *Lady-day* 1834 under a yearly tenancy by a written demise from him not under seal. At *Christmas* following *Nevitt* received the rent. After this, and before the next *Lady-day*, defendant *Butler* laid claim to the premises as heir at law of *Mrs. Nevitt*, deceased, and demanded rent of plaintiff. Whereupon plaintiff went with him to *Nevitt*, and was then informed by *Nevitt* that he had given up the premises to defendant *Butler*, who was now to be his landlord; and that the rent was thenceforward to be paid to defendant *Butler*. Plaintiff acquiesced in this; and, when the rent was due at *Lady-day* 1835, paid to defendant *Butler* 6s. 6d. on account. Plaintiff afterwards, and before further payment by him, received notice from another claimant, *Daniel Butler*, to pay rent to him, and thereupon refused to pay it to any body until the dispute was settled. Defendants then distrained on plaintiff. At the trial, the plaintiff offered in evidence a deed of settlement prior to the will of 1783, to shew that the premises in question were leasehold; that *Daniel Butler* was entitled to a share of them under that settlement; and that the defendant

defendant *Butler* never had any title. The recorder directed the jury to find a verdict for defendants, giving leave to move to enter a verdict for the plaintiff, or for a new trial. *Townsend*, obtained a rule accordingly.

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against
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W. H. Watson now shewed cause. *Nevitt*, not being tenant by the curtesy, had no title whatever after his wife's death; and he and his tenant might have been ejected forthwith. Being satisfied with the title of the defendant *Butler*, he authorised his tenant to become the tenant of the defendant. The legal effect of this was either an adoption by the defendant *Butler* of *Nevitt's* demise to the plaintiff, whereby the plaintiff became the tenant of the defendant ab initio; or a fresh demise by the defendant to the plaintiff upon the disclaimer of *Nevitt*. In either case, the plaintiff cannot now dispute the defendant's title. This is not a mere attornment under mistake, as in *Cornish v. Searell (a)*, where the attornment was to sequestrators who had, in fact, no legal title. The case differs from those in which the tenant's possession was originally a lawful one, and where the only question was, to whom the rent was to be paid.

Townsend, contra. The plaintiff was induced to attorn to the defendant *Butler* by *Nevitt's* misrepresentation. It was, therefore, an attornment in ignorance of the real title, which was in *Daniel*, and not in the defendant. The distinction between receiving possession from one who has no title, and merely attorning by mistake to such a person, is noticed by *Bayley J.* in *Cornish v. Searell (b)*, which is quite in point. The defendant *Butler* does not claim under *Nevitt*; but *Nevitt* disclaims his own title as landlord, and represents the defendant as the party

(a) 8 B. & C. 471.

(b) 8 B. & C. 475.

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 against
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justly entitled. The defendant attorns upon the said that statement, which turns out to have been incorrect. Under such circumstances, the tenant may call in question the defendant's title; *Rogers v. Pitcher* (a), *Fenn Duplock* (b), *Gregory v. Doidge* (c), *Hopcraft v. Keys Doe dem. Plevin v. Brown* (e). The last case is very much like the present. If, then, proof of the real title is possible, it disproves the tenancy under the defendant *Butler*, and is evidence on the issue of non tenuit.

LORD DENMAN C. J. *Nevitt*, who let the plain into possession, and whom the plaintiff was thereby bound to acknowledge as his landlord, informs him that the premises belong to the defendant *Butler*, and that the rent is to be thenceforward paid to the latter, and demands it accordingly, and receives part of it. This is either a ratification of the demise by *Butler*, or is a fresh demise by him. In either case the same consequence follows; viz. that the title of the defendant *Butler* cannot be disputed by the tenant. As no deception or misrepresentation was intended by *Nevitt*, or by the defendant *Butler*, the case falls within the ordinary rule.

LITLEDALE J. I entertain some doubts on the case, but on the whole it seems to fall within the rule. The legal effect of the arrangement is, that the plaintiff must be considered as having become tenant to the defendant *Butler* under a fresh taking from *Christmas*: and avowry is therefore proved.

PATTESON J. There is a distinction between disputing the title of one who has actually let the party in

(a) 6 Taunt. 202.

(b) 2 Bing. 10.

(c) 3 Bing. 474.

(d) 9 Bing. 613.

(e) 7 A. & E. 447.

possession

possession, and of one who, afterwards, claims to be entitled. In the latter case the tenant may generally dispute it by shewing title in another. Here the effect of the arrangement in 1834 is rather a question of fact than of law. I am not sure that it may not be considered as an original taking from *Butler* himself; for *Nevitt* treats himself as the agent of *Butler*, who adopts the demise. But, at all events, *Nevitt* disclaims title in himself, and points out *Butler* as the real landlord; the plaintiff acquiesces, and consents to the new holding; and there is no evidence of any attempt to eject him by the party whose title he now attempts to set up.

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against
BUTLER.

WILLIAMS J. concurred.

Rule discharged.

YORKE *against* CHAPMAN.

Saturday,
May 25th.

IN last *Hilary* term, Sir *John Campbell*, Attorney General, had obtained a rule nisi to stay proceedings in the above action, on an affidavit of the following facts.

Defendant, who was marshal of the Queen's Bench prison, had, in the *Spring* of 1837, confined plaintiff, then being a prisoner for debt, in the strong room of the prison for one month, under *R. E. 6 G. 4. (a)*.

ings in an action of trespass commenced by a prisoner for such abuse. But *semble*, if the prisoner resorts to his summary remedy, and obtains the decision of the Court thereon, he will not be permitted afterwards to bring an action for the same cause.

The summary remedy given by stats. 2 G. 2. c. 22. s. 6. and 32 G. 2. c. 28. s. 11. to a prisoner for an abuse committed by a gaoler, &c., in his office, is cumulative: therefore the Court will not stay proceedings. But *semble*, if

(a) By which it is ordered that, if any prisoners (besides other offences mentioned) shall be guilty of behaving themselves in a riotous or disorderly manner in the prison, it shall be lawful for the marshal to confine such prisoners in such of the strong rooms of the prison as the marshal shall think fit, and for such time as the marshal shall adjudge and think adequate to the offence, not exceeding one calendar month for the first offence, and three calendar months for the second.

The

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The misconduct of the plaintiff consisted in molesting and abusing the prison watchmen in the execution of their duty. In *January* 1838, an action of assault and false imprisonment was commenced by plaintiff against defendant; and the declaration was filed 21st *January* last. No petition had been delivered by plaintiff to this Court or any of its Judges, complaining of the alleged grievance. The plaintiff's affidavit denied the misconduct imputed to him, and also charged the defendant with refusing to hear evidence in disproof of it.

Platt now shewed cause. There is no precedent for such an application; nor adequate remedy for the plaintiff, if it is granted. The defendant's condition would be better than that of a justice of the peace. The statutes, which give a right of petition to this Court, are remedies for the benefit of prisoners, and do not deprive them of their common law remedies.

Sir *John Campbell*, Attorney General, contra. There is no precedent for such an action by a prisoner, and therefore none for this application. The Court is only required to enforce the existing law by confining the plaintiff to his proper remedy. There are two acts of parliament in point, viz. 2 G. 2. c. 22. s. 6., and 32 G. 2. c. 28. ss. 6, 11. By virtue of these, and of the rules of this Court made in pursuance of them, viz. *R. M.* 3 G. 2. (a), *R. H.* 59 G. 3. (b), and *R. E.* 6 G. 4. (c), the marshal has power to confine in the strong room for

(a) Which limits the marshal's power of confinement, and gives an appeal to the Court, or a Judge in vacation. *Rules, orders, &c., in the Court of King's Bench*, (2d ed. 1747.)

(b) Which directs the marshal, and his officers, to present petitions of prisoners, complaining of grievances, to the Court or a Judge in vacation.

(c) See p. 207. note (a).

certain

certain offences; and this Court, or any of its Judges, have ample power to punish and to award reparation and costs upon the petition of a prisoner complaining of abuse. The grievance is at most only a confinement in one room instead of another; and there is no charge of excess. It will be of serious consequence if prisoners, avowedly insolvent, are to be at liberty to harass their gaoler with actions, where a specific and easy remedy has been provided for them. No delay can be attributed to the defendant, who has applied as soon as possible after the filing of the declaration.

Cur. adv. vult.

On a subsequent day in this term (*Wednesday, 12th June*) the judgment of the Court was delivered by

LORD DENMAN C. J. This was a motion to stay proceedings in an action of trespass brought against the marshal of the Queen's Bench prison, for confining the plaintiff in the strong room. By statutes 2 G. 2. c. 22., and 32 G. 2. c. 28., and by Rules of Court founded on those statutes in *M. 3 G. 2. (a)*, *H. 59 G. 3. (b)*, and *E. 6 G. 4. (c)*, power is given to the marshal to imprison in the strong room any of the debtors in his custody who are proved to have been guilty of certain offences. And by the same statutes and rules, for the more speedy correction of abuses, the courts and judges are empowered and required to hear complaints against the keepers of prisons in a summary manner, and award the party complaining, if injured, recompense and costs. But the statutes contain no restrictive words, forbidding any action at law in such cases, or enabling the courts to stay any actions.

(a) See p. 208. note (a).

(b) See p. 208. note (b).

(c) See p. 207. note (a).

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The provision for recompence by summary complaint appears plainly to be cumulative, and not to take away the right of any party who may conceive himself aggrieved to bring an action for redress. If, indeed, he has recourse to the summary remedy, and obtains : recompence, and afterwards brings an action, the Court would interfere, as is suggested by Lord *Mansfield* in *Cameron v. Reynolds* (a); and probably a decision against him, on a summary application, might have the same effect. But we think that he is not compellable to resort to such remedy; and, in the absence of any authority for such an interference, we think that the Court has no power to stay the present proceedings. The rule must therefore be discharged.

Rule discharged

(a) 1 *Cowp.* 403.

Saturday,
May 25th.

WHITEHEAD against TAYLOR.

A cognizance by defendant as bailiff of an executor, for rent due to the testator, is supported by proof of a distress by him in the name of the testator and by his direction, but after his death; such distress, though made before probate, having been afterwards adopted and ratified by the executor.

REPLEVIN. Cognizance by defendant as bailiff of *Mary H.*, executrix of *John H.*, for a year's rent due in the lifetime of *John H.*, in respect of premise held and enjoyed by plaintiff as tenant to the said *John* the plaintiff continuing in possession thereof under the demise after the death of the said *John*, until, at, and after, the said time when &c. Profer of letters testamentary. Plea, that defendant, at the said time when &c., was not the bailiff of *Mary H.*, in manner and form &c. Issue thereon.

On the trial of the cause before Lord *Denman* C. J., at the *Middlesex* sittings after *Easter* term, it appeared that the defendant, a broker, was directed by the testator to distrain on the plaintiff; that the testator died just before

before the distress was taken; and that the executrix neither withdrew the distress, nor gave any fresh authority to distrain, but recognised and adopted it. His Lordship directed a verdict for the defendant, giving liberty to move to enter it for the plaintiff.

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against
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Jervis now moved in pursuance of the liberty reserved. The death of the testator revoked the authority of the defendant. At the time of distress he was the bailiff, not of the executrix, but of the testator. Having distrained in one name, he cannot now avow in the name of another, though he might have distrained and avowed for different things. It is true that if a distress is taken in the name, but without the authority, of a stranger, the latter may ratify the agency and make it good ab initio. But here the defendant was properly authorised to distrain by one whose authority was afterwards revoked by death. The tenant can look only at the authority in force at the time when the distress is made. Finding it to be a defective one, he must replevy; otherwise his property may be sold, and yet the rent remain unsatisfied. Having replevied, he is bound to prosecute his suit. Under such circumstances it would be unjust that the subsequent ratification of a third party, not entitled at the time of the distress, should be set up to defeat the action. Besides, the executrix, whose power both of action and distress is given by stat. 32 H. 8. c. 37. s. 1. (a), can support neither the one nor the other before probate; and therefore cannot ratify a distress made before probate.

Cur. adv. vult.

(a) See now stat. 3 & 4 W. 4. c. 42. s. 37. 2 *Williams on Executors*, 669. (ed. 2.), Part III. Book I. ch. i.

1839. On a subsequent day in this term (*Wednesday 12th June*), judgment was given by

WHITTEHEAD
against
TAYLOR.

LORD DENMAN C. J. [After stating the pleadings, his Lordship proceeded.] The evidence shewed that the testator had given the defendant authority to distrain, but died almost immediately, before the distress was taken. After it had been taken in the testator's name, the executrix fully recognized and adopted the defendant's act of distraining. It was objected that, by the testator's death, the authority was revoked; that the executrix had no power to distrain before probate, because she could not maintain an action for the rent at that time; and that the distress, being made in the name of one whose authority had expired with his life, could not be ratified by his executrix afterwards.

We are of opinion that both these objections are removed by the principle of relation.

1. The rent was due to the estate; and the law knows no interval between the testator's death and the vesting of the right in his representative. As soon as he obtains probate, his right is considered as accruing from that period. If an action, indeed, be brought in that interval, he cannot proceed to declare, because he must make profert of the letters testamentary in his declaration; but that reason does not apply to a distress, or any other act performed in assertion of his right as executor (*a*).

2. The executrix could ratify the act of the defendant, as testator's bailiff, though his authority was at an end; for she might have ratified the act of an entire stranger, as appears by the decision of *Anderson C. J.*, in which

(a) See 1 *Williams on Executors*, 172, &c. (ed. 2.), Pt. I. Bk. IV. Ch. i. § 2.

Periam concurred, in an *Anonymous* (a) case in *Godbolt's Reports*, cited in 4 *Vin. Abr.* 1. *Bailiff*, (D), pl. 7. Such ratification has been held to legalise a past act, even when given after action brought. We therefore think that there ought to be no rule.

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WHITEHEAD
against
TAYLOR.

Rule refused.

(a) *Godb.* 109.

BASTARD *against* SMITH and Others.

ERLE obtained a rule in *Trinity* term 1838 to shew cause why the Master should not review his taxation of the plaintiff's bill of costs in this cause. The principal exceptions to the taxation were that he had allowed the following items with respect to two of the plaintiff's witnesses, namely, *Samuel Anderson*, the registrar of affidavits in Chancery, and *Charles Devon*, of the *Chapter House, Westminster*, a gentleman conversant with ancient records.

The expense of a witness at Nisi Prius to translate and explain ancient records of a public nature, and to watch and explain the records produced by the opposite party, and the expense of searching for, and obtaining copies and translations of, such records to be used in evidence, will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them.

Subpoena duces tecum for *Samuel Anderson*, £ s. d.

the registrar of affidavits in Chancery, to produce the affidavits filed in the Court of Chancery, and fee - - - 0 10 0

Copy thereof to serve on him, fo. 10. - 0 3 4

Service of subpoena on him in *London* - 0 5 0

Paid his travelling expenses to and from

Exeter, 176 miles - - - 8 16 0

Paid him for his attendance at the assizes

seven days, at 2l. 2s. per day - - 14 14 0

Service of subpoena on Mr. *Charles Devon* in

London - - - 0 5 0

The costs of the attendance of an officer of the Court of Chancery, to produce affidavits filed there, for the purpose of using them at a trial to check

the testimony of the same deponents at Nisi Prius, will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them.

Q 2

Paid

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BASTARD
against
SMITH.

Paid his travelling expenses to and from *Ex-*
cter, 176 miles (say half in this case) - 4 8 0

Paid him for his attendance at the assizes ten
days, five days at 1*l*. 1*s*. 6*d*., and five
days at 3*l*. 3*s*. per day (*a*) - 23 12 6

The Master had further allowed a payment to
Devon of 93*l*. 8*s*. 11*d*. for making searches for, obtain-
ing office copies of, and translating, records intended to
be proved at the trial on the part of the plaintiff.

The affidavits mentioned above were affidavits sworn
by certain witnesses in a suit in Chancery between the
same parties and upon the same subject, who, it was
expected, would be produced as witnesses for the de-
fendants at the trial of this cause. An order was ob-
tained from the Lord Chancellor for the production of
these by *Anderson*; who accordingly attended the trial,
solely for that purpose. The defendants had not been
previously called upon to admit copies of them as
directed by *Reg. Gen. H. 4 W. 4. s. 20. (b)*. They were
carried down to the assizes by the plaintiff in order to
check the testimony of the witnesses, and to enable
counsel to cross-examine them; and they were actually
used for that purpose on the trial; *Tindal C. J.*, who
tried the cause, having held that plaintiff's counsel had
no right to cross-examine one of the witnesses on the
contents of his own affidavit, and to use it afterwards,
without putting the original into his hands to refresh his
memory (*c*).

With regard to the payment to the witness *Devon*,
it was objected that his attendance was only for the
purpose of proving and explaining copies and transla-

(*a*) See *Scrern v. Olive*, 3 *B. & B.* 72.

(*b*) 5 *B. & Ad.* xvii.

(*c*) See *The Queen's Case*, 2 *B. & B.* 286.

tions of ancient charters and documents of a public nature from repositories at the Tower, Rolls' Chapel, &c., which every one was supposed to know and understand; and that defendants had never been called upon to admit them agreeably to the rule of Court. They also objected that the expense of searching for documents was not properly an item of costs as between party and party, but between attorney and client.

On the part of the plaintiff it was stated, on affidavit, that the copies produced and proved by *Devon* were office copies of ancient records from the date of the Conquest down to that of Queen *Elizabeth*; that *Devon* was subpœnaed, not only to prove such copies, but also to translate and explain them, and to watch and explain, if necessary, the documents, and translations of documents, of very early date, offered in evidence by the defendants, on the meaning of which there was some difference of opinion; that the charge for searching and obtaining office copies was in respect of records which were actually found and intended to be used in the cause, and were material and necessary evidence for the plaintiff; and that the last item was objected to before the Master only on the ground that it included charges of search for documents not found, or not intended to be used in the cause. It was also alleged that a book, relied upon by the defendants, called "*Pearce's Stannary Laws*," and which was actually offered in evidence at the trial and rejected by the Judge, was inaccurate; and that one of the reasons for procuring the attendance of *Devon* was to prove such inaccuracy.

The issue in the action was on the existence of a custom for all tinnerns in *Devonshire* to divert water,

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and make leats through any lands in the county for use of tin mines.

Neither of the witnesses was in fact called; nor any of the above documents offered in evidence or part of the plaintiff, inasmuch as the defendants permitted to begin on the trial, and the plaintiff tained a verdict without producing any evidence (a)

Sir *John Campbell*, Attorney General, and *M. S.* now shewed cause, on the part of the plaintiff. rules on which the defendants rely are *R. H. 2* VI. and VII. (b); and *Reg. Gen. H. 4 W. 4. s. 20.* but no one of them is applicable. With respect to the affidavits, mere copies, though admitted to be correct, would have been insufficient to enable the plaintiff to cross-examine upon their contents, as was held at the trial. The original could be produced in the hands of the proper officer (d). As to the witness, he was subpoenaed, not solely to prove the accuracy of the copies, but also to translate and examine them, as well as to watch the documentary evidence produced on the other side. He was called to give oral evidence, as an antiquary, upon the ancient records and might have been asked as to the result of his examination of them; *Rorve v. Brenton* (e). Besides, the rules apply to the case of a translation, which in fact, the oral evidence of the witness reduces to writing.

Erle, contra. The original affidavits were not necessary for the mere purpose of furnishing materials

(a) See *Bastard v. Smith*, 2 Moo. & Rob. 129. (b) 3 B. & A.

(c) 5 B. & Ad. xvii.

(d) See *Bentall v. Sydney*, ante, 162.

(e) 3 Man. & R. 212. S. C. (not S. P.) 8 B. & C. 737.

examined

examination. Copies would have been sufficient, except to fix the witness with perjury (a). Then, as to the attendances and charges of *Devon*, the plaintiff cannot charge the defendants with precautionary measures, such as searching for evidence, and watching the proofs of the defendants. He was present as an adviser, rather than a witness. [*Patteson J.* Would you disallow the expence of an interpreter?] The documents were all of a public nature, of which the defendants would have admitted copies, and which all people, or at least the Court, are supposed to understand.

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LORD DENMAN C. J. The cases are not within any of the rules referred to. It may, perhaps, be said that the translation of an ancient record is not a matter of fact which requires the production of a witness, and that the Judge should be able to translate and explain it to the jury; but it is, at all events, convenient that such a person as Mr. *Devon* should be present to do so.

LITLEDALE, PATTESON, and WILLIAMS Js., concurred.

Rule discharged.

(a) But see *Highfield v. Peake, Moo. & Mal.* 109.

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Monday,
May 27th.

The Earl of BEAUCHAMP *against* TURNER.

In a suit for subtraction of tithes in the Spiritual Court by an impropriator, defendant's personal answer stated a lease of them by plaintiff to a third party, by whom they were demanded, and also that they belonged to the vicar, and not to plaintiff. Defendant also put in a responsive allegation that, by immemorial usage, custom, and prescription, the tithes were deemed small or vicarial, and, as such, due to the vicar, and not to plaintiff. Plaintiff's personal answer denied the usage as stated by defendant; and the Judge assigned a day to hear on the sufficiency of plaintiff's answer; and term probatory to defendant: Held that, in this stage of the cause, there was no issue on the lease; that the only matter in issue, viz. the immemorial right of the vicar, was properly cognizable by the Spiritual Court; and that there was no ground of prohibition.

DENMAN had obtained a rule to shew cause why prohibition should not issue to the Consistory Court of the Bishop of *Lichfield*, to prohibit further proceedings in a suit for subtraction of tithes between the above parties.

The plaintiff sued as impropriator of certain tithes of the parish of *Duffield* in *Derbyshire*; among others, of hay, potatoes, and agistment.

The defendant, in his personal answer to the different articles of the libel, stated two defences, namely, that the plaintiff had leased all his tithes to certain persons who had demanded them; and that the three kinds of tithes above specified belonged to the vicar, and not to the plaintiff. An allegation was also admitted on the part of the defendant, in which he alleged that, "by immemorial usage, custom, and prescription," the tithes of hay in the township of *W.*, in which defendant's farm was situate, and the tithes of potatoes and of agistment in the parish, "have been, and are, deemed and taken to be small or vicarage tithes, and not great tithes," and, as such, due to the vicar and not to the plaintiff.

To this allegation, the personal answer of the plaintiff denied that there was such immemorial usage, custom, or prescription as alleged by defendant with respect to the above-mentioned tithes.

The subsequent steps taken in the cause were en-

tered

tered in the Bishop's assignation book of causes as follows.

“Easter term, 1st session 17th April. The judge, at Chinn's” (defendant's proctor) “petition, continued the assignation to hear on the sufficiency of the plaintiff's answer to the defendant's allegation to the next court day. The judge continued Chinn's term probatory to the next court day.”

“2d session, 8th May. The term probatory of Chinn was renewed to the next court day.”

“3d session, 22d May. The same to the next court day.”

“Trinity term, 1st session, 5th June. Chinn alleged that his client was proceeding in prohibition.”

Kelly and Whitehurst now shewed cause. No issue is here joined upon the lease stated in the personal answer of the defendant, but only on the customary right of the vicar stated in the responsive allegation. The question is therefore one between the rector, or impropiator, and the vicar, which is no ground of prohibition; *Com. Dig. Prohibition*, (G 6.); 18 *Vin. Ab.* 25., *Prohibition*, (Z) pl. 5. (a); *Cheeseman v. Holy* (b). If the issue had been upon the lease, it would, perhaps, have been more difficult to support the jurisdiction of the spiritual court; *Wortes v. Clifton* (c), cited *Com. Dig. Prohibition*, (F 14.). But at present it does not appear that the lease is relied upon; it may, if relied upon, be confessed and avoided by some matter of law or matter ex post facto, which may not be denied, or of which the Court may have cognisance. There are many matters, pleadable at common

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(a) *Beddingfield v. Frake*. S. C. Moore, 909.

(b) *Willes*, 680.

(c) 1 *Roll. Rep.* 61. S. C. Cro. Jac. 352. S. C. (as *Clifton v. Oates*)
2 *Bulstr.* 283.

law,

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law, of which the Spiritual Court may incidentally take cognisance, provided it comes to no decision repugnant to the common law; *Shotter v. Friend* (a). Thus, the jurisdiction in a suit for tithes is not ousted because a question of parish bounds may arise; or the suit is by a portionist; or a lease by the parson to the defendant is pleaded; or a custom of sowing corn, or of tithing, is alleged; *Com. Dig. Prohibition*, (G 6.), (G 7.); 18 *Vin. Ab.* 19. *Prohibition*, (U), pl. 23. If the insertion of some immaterial fact or statement in the pleading were to exclude the ecclesiastical jurisdiction, a party could always exclude it, even where the matter really in issue is clearly cognisable; and if the possibility of some future issue on a matter of common law cognisance is ground of prohibition, the Ecclesiastical Court may be prohibited in every cause. The effect of the pleadings, as they now stand, is illustrated by *Morgan v. Hopkins* (b) and *Byerley v. Windus* (c), where it is stated by Bayley J. (d) that neither the answer nor plea ever put in issue the facts of the libel. In *French v. Trask* (e), indeed, a prohibition was issued, where the defendant had proceeded no further than putting in an answer of a modus; but the effect of the pleading does not appear to have been understood; and in *Byerley v. Windus* (g) Bayley J. refers to it as a case in which a modus was regularly pleaded, on which ground alone it can be supported. [*Littledale J.* The modus might be admitted, and the parties only go for an account.] The defendant has applied to this Court too soon; *Hall v. Maule* (h). [Lord Denman C. J. Are there any interrogatories on the lease?] There are none.

(a) 2 *Salk.* 547.(c) 5 *B. & C.* 1.(e) 10 *East*, 348.(h) 7 *A. & E.* 721.(b) 2 *Phil. Ecc. Rep.* 582.

(d) p. 23.

(g) 5 *B. & C.* 22.

Denman,

Denman, *contra*. *French v. Trask* (a) is exactly in point. The defendant there answered upon oath a *modus*; and no issue was taken on it: yet this Court prohibited the proceeding. So in *Byerley v. Windus* (b) the personal answer, denying the prescriptive title of the plaintiff below, was considered sufficient to entitle the party to a prohibition; and it is there (c) said that "the courts of common law are not bound to wait till the parties have incurred the expense of putting it in issue, but the prohibition is grantable at once." The same principle is to be collected from *Darby v. Cosens* (d), which case shews that matter, intervening incidentally, will oust the spiritual jurisdiction. There *Ashurst J.* said (e), "The instant the *modus* is pleaded, their jurisdiction is at an end."

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LORD DENMAN C. J. The rule must be discharged. *French v. Trask* (a) is indeed like the present case; but the authorities shew that the view taken by the Court in that case was erroneous. There is neither plea, nor allegation, tending to an issue on any matter which the spiritual court is incompetent to determine.

LITTLEDALE J. The personal answer of the defendant is nothing to the purpose. The issue between the parties involves nothing which the Ecclesiastical Court may not properly try.

PATTESON J. In order to raise an issue on the lease, it should be stated in a responsive allegation.

WILLIAMS J. concurred.

Rule discharged.

(a) 10 *East*, 348.

(c) p. 21, 22.

(e) 1 *T. R.* 555.

(b) 5 *B. & C.* 1.

(d) 1 *T. R.* 552.

1839.

Monday,
May 27th.

ROFFEY, Administrator of ROFFEY, against
GREENWELL and Another, Executors of
STAPYLTON.

A promissory note in this form, "I promise for myself and executors to pay F. H. or her executors, one year after my death, 300*l.* with legal interest," bears interest from the date of the note.

ASSUMPSIT on a promissory note given by defendants' testator to *Frances M. Harris*, deceased for 300*l.* and interest. Defendants paid into Court 336*l.* 6*s.*, and pleaded that plaintiff had not sustained damages to a greater amount. Plaintiff replied further damages. Issue having been joined thereon, by consent and by a Judge's order, the following case was stated for the opinion of the Court.

On the 20th July 1808, *Stapylton*, the testator, made a promissory note to *Frances Harris*, of which the following is a copy.

"Norton, July 20th, 1808.

"I promise for myself and my executors to pay to *Frances Mary Harris* (or her executors) one year after my death 300*l.* with legal interest.

"300*l.*

Henry Stapylton."

The note was indorsed —

"To *Frances Mary Harris*, *Merstham*, near *Ryegate*, *Surrey*."

On 3d October 1808, *Frances M. Harris* married the plaintiff, *Roffey*. On or about 14th December 1816 she died. On 21st August 1835 *Stapylton* died, having by his will appointed defendants his executors, who duly proved the same. On 17th November 1837 administration was granted to plaintiff of the goods and effects of his said late wife.

The question for the opinion of the Court was, whether

ther the plaintiff was entitled to recover, under the circumstances, more than the sum of 336*l.* 6*s.* paid into Court; and, if the Court should be of opinion that the plaintiff was entitled to recover more than the said sum, then judgment was to be entered against defendants, as executors, by confession, for such sum as the Court should direct. The case was argued in last *Hilary vacation* (a).

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Platt, for the plaintiff. Though there is no reported case exactly in point, the rule is, that a note, payable at a fixed time with interest, bears interest from the date of it; *Kennerly v. Nash* (b), *Doman v. Dibbon* (c). In *Richards v. Richards* (d) the interest on a note, given by the maker to his own wife, was held to commence from the date of the note; and, as she could not sue on it until after her husband's death, it was, in effect, a note made payable after his death. It would be absurd to suppose that a note, expressly bearing interest, and presumably given for value, was intended to carry no interest during the maker's life, though he lived twenty years afterwards.

Erle, contra. In the cases cited, the notes or bills were given for value received; and they appeared, either aliunde or on the face of them, to have been so given. *Richards v. Richards* (d) was a loan in the husband's lifetime. Here, though a consideration must perhaps be presumed, it need not be a pecuniary consideration, or one on which interest may be supposed to run, as

(a) February 6th, 1839, before Lord Denman C. J., Littledale, and Coleridge Js.

(b) 1 *Star.* 452.

(c) *Ry. & Moo.* 381.

(d) 2 *B. & Ad.* 447.

a loan;

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a loan; especially as the note does not profess to "interest. No transactions or dealings between the ties are shewn, to give probability to a claim of interest during the lifetime of the maker, who certainly never have been himself called upon to pay any. *Steddale* J. It looks like a voluntary gift in the nature of a legacy (a).]

Cur. adv.

Lord DENMAN C. J. now delivered the following judgment.

The question was, from what period interest should be computed on a note in the following form,—"I promise, for myself and my executors, to pay to *Elizabeth Harris* (or her executors), one year after my death 300*l.* with legal interest,"—no proof of the consideration being given.

It was admitted that no case in point could be found nor any which lays down the rule, or principle, by which it is to be decided. Generally speaking, an instrument of this sort carries interest from its date, whether payable on demand, or at a time specified. The reason is that the party, who makes the promise, must be expected to keep it; and, if he does, no interest can be due any other period than the date.

In the present case, there is indeed another period at which it might be computed, that of the maker's death; but it appears improbable that, if that was his intention, he should not have expressed it with more distinctness. We think, in the absence of all particular proof, we must presume the note to have been given for value.

(a) See *Marex v. Shute*, cited in *Masterman v. Maberly*, 2 *Hagg. Rep.* 247.

so that interest would be due from the date. If that be doubtful, the instrument ought to be construed most strongly against the maker. The plaintiff is therefore entitled to the larger sum ; and judgment must be entered for it.

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Judgment for the plaintiff for principal and interest from the date of the note.

COLLINS *against* BEAUMONT.

Tuesday,
May 28th.

SCIRE FACIAS to have execution on a judgment of the Court of Queen's Bench.

out arrested and detained in execution. **Plea :** that, after judgment recovered, plaintiff sued a *ca. sa.* upon it, under which defendant was arrested and detained in execution. **Verification.** **Repetition :** that, whilst defendant was detained in the custody of the sheriff under the said writ, he made an application to one of the Barons of the Exchequer for his discharge out of custody for irregularity ; that the said Baron did thereupon, on such application, and upon the grounds therein alleged by defendant, that the issuing of the said writ and taking defendant under it, were, according to the practice of the Court of Q. B., irregular, order defendant to be discharged out of custody with costs, defendant thereby undertaking not to bring any action on account of the arrest : that defendant was, in pursuance of the said order, discharged out of custody, and has never since been in custody thereon, or otherwise, in the said action ; and that the order was afterwards duly made a rule of Court on the application of defendant. **Verification.**

Arrest on a writ of *ca. sa.* is no bar to a *scire facias* on the judgment, where the party has been discharged out of custody by reason of irregularity in issuing the writ.

General demurrer. Joinder.

The

1839. The case was argued in last *Hilary* vacation (a).

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Wightman, in support of the demurrer. The arrest on the writ of ca. sa. is a satisfaction: and the plaintiff, having elected to issue it, can take no other proceeding on the judgment. The replication does not state the nature of the irregularity which caused it to be set aside, or shew that the writ was void.

Lumley, contra. *McCormick v. Melton* (b) is in point. That was debt on a judgment; and the subsequent pleadings were like the present. Arrest on a ca. sa. which, on being set aside, became a nullity was there held to be no satisfaction.

Wightman, in reply. That case is certainly not materially distinguishable from this, though the replication there specifies the irregularity; but it appears not to have been fully argued, and ought to be reconsidered. If the plaintiff had consented to the discharge, he clearly could not have proceeded on the judgment: is he then to be in a better situation by reason of his own irregularity? A discharge by a Judge, upon terms acquiesced in by the plaintiff, is equivalent to consent. Suppose the plaintiff, being aware of an irregularity, had consented on that account to the discharge, this would have been satisfaction. [*Littledale J.* Might not the irregularity have been the act of the Court, which should not prejudice the plaintiff?] It is not stated what the irregularity was; but, if it was (as may be presumed) an irregularity of the party, then the defendant may be imprisoned twice through the plain-

(a) February 4th, 1839, before Lord Denman C. J., *Littledale, Williams, and Coleridge Js.*

(b) 1 C. M. & R. 525. S. C. 5 Tyrwh. 147.

tiffs'

tiff's own default. A writ irregularly issued is not a nullity. It will still protect the officer.

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Cur. adv. vult.

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Lord DENMAN C. J. now delivered the judgment of the Court.

To a declaration in *scire facias* defendant pleads that he has been already arrested by virtue of a *ca. sa.* on the same judgment. Replication, that defendant was, on his own application, discharged from that arrest "for irregularity," not specifying what the irregularity was. The defendant demurred. On the argument we doubted whether an arrest on *ca. sa.* might not be a satisfaction of the debt, though it was irregular. We were referred, however, to a case in point, *M'Cormick v. Melton (a)*, where the Court of Exchequer held such a replication good; Lord *Lyndhurst* saying that a writ, set aside for irregularity, was a nullity. This reason may possibly be too large: but we think the case well decided, for that a defendant cannot relieve himself from an arrest as irregular, and then set up the same arrest as a bar to a subsequent execution.

We must, therefore, over-rule the demurrer.

Judgment for the plaintiff.

(a) 1 C. M. & R. 525. S. C. 5 Tyrwh. 147.

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Tuesday,
May 28th.

DOE on the demise of ELIZABETH EVANS against
HENRY EVANS.

Testatrix devised lands to L. for life, remainder to his first and other sons and daughters successively in tail. L. died, leaving one son, and one posthumous daughter. The son died. Testatrix, being ignorant of the existence of the daughter, made a codicil, reciting the death of L. without leaving any issue, and devising the land to H., in the same manner as she had before done to L. : Held, that the codicil must be construed as a conditional revocation only, and was inoperative as against the daughter of L., though testatrix, after making the codicil, and two years before she died, had become acquainted with her existence.

IN an action of ejectment, tried at the assizes for the county of *Anglesey*, a verdict was taken for the plaintiff, subject to the opinion of the Court upon the following special case.

Jane Jones, widow, being seised in fee of certain freehold premises, by her will, bearing date 28th *July* 1819, and duly executed and attested to pass real estate, devised all her lands and tenements to certain trustees and their heirs, upon certain trusts therein mentioned as to part of her lands, not in question in this case, and, as to all the residue of her real estate (subject to the payment of an annuity to *Richard Owen* during his life), upon trust to the use of *Lewis Evans* of *Holyhead*, mariner, and his assigns, for and during the term of his natural life, without impeachment of waste; remainder to the said trustees, in trust to preserve contingent remainders and, from and after his decease, to the use of the first and others sons of the said *Lewis Evans*, in tail; and, for default of issue in tail of such sons, to the use of the first and other daughters of the said *Lewis Evans*, in tail and, for default of such issue in tail, to the use of her own right heirs for ever.

On 27th *May* 1829, the testatrix duly made the following codicil to her said will. Whereas, in and by my will, I have given the residue of my lands, &c. (subject to an annuity of 20*l.* to my cousin *Richard Owen* for his life), to the use of *Lewis Evans*, of *Holyhead*, and his assigns, for life; with remainder to his first and other

other daughters in tail ; with remainder to my own right heirs : *and whereas the said Lewis Evans has since departed this life without leaving any issue ;* now I do hereby give and devise all the residue of my lands, &c., as mentioned in my said will (subject to the payment of the said annuity), unto and to the use of my relation *Henry Evans*, and his assigns, for the term of his natural life, without impeachment of waste. The codicil then proceeded to make the same settlement on the first and other sons of *Henry Evans* in tail, and, on failure of their issue, on his first and other daughters in tail, that she had previously made in favour of *Lewis Evans* and his issue.

Lewis Evans and *Henry Evans* were each related in the same degree to the testatrix, and were first cousins to each other.

Lewis Evans was married in 1818, and in 1820 had a son born. He died in *September 1821*, leaving his wife pregnant with *Elizabeth Evans*, the lessor of the plaintiff, who was afterwards born, a posthumous child, in *February 1822*. The son of *Lewis Evans* died in 1825. The testatrix, when she made the codicil to her will in 1829, did not know of the birth and existence of *Elizabeth Evans*, the daughter of *Lewis Evans* ; but she became acquainted with those facts afterwards, in 1831, two years before her death. The testatrix died in 1833.

The question for the opinion of the Court was, whether the codicil, made under the above circumstances, had the effect of revoking the devise of the residuary real estate in the will, under which devise the lessor of the plaintiff claimed the premises in question. If the Court should be of opinion that the codicil did not

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revoke the devise in the will, but that the devise of the lessor of the plaintiff was a valid and subsisting devise at the time of the death of the testatrix, and that she was entitled under the same to the premises in question, then the verdict was to stand. But, if the Court should be of a contrary opinion, then the verdict was to be entered for the defendant.

R. V. Richards for the plaintiff. The codicil, being made under error, and in ignorance of the existence of a daughter of *Lewis Evans*, is inoperative, and does not revoke the prior disposition of the will. If a false impression of fact is the apparent foundation of the change of intent shewn in a later will or codicil, the operation of the latter is contingent upon the existence or non-existence of the fact. Such is the rule laid down in the text books; *Swinburne on Wills*, part vii. s. 5. (p. 894, &c. 7th ed.); *Powell on Devises*, 1 vol. p. 523. (3d ed., by Jarman); 1 *Williams on Executors*, p. 93. (2d ed.); *Roberts on Wills*, Vol. II. p. 40. (3d ed.). Some of the cases referred to as authorities for this proposition are, indeed, cases of personalty; but there is no distinction, in this respect, between wills of real and of personal property (a). In *Campbell v. French* (b), where the death of the legatee was alleged as the cause of revocation in a subsequent codicil, and it was proved that the legatee was not, in fact, dead, Lord *Loughborough* C. held that the codicil did not revoke the legacy. In *Kennell v. Abbott* (c) a legacy made under a misapprehension of the legatee's character was held to fail. In *Attorney General v.*

(a) See, however, the judgment of the Court of Exchequer Chamber in *Marston v. Roe d. Fox*, 8 A. & E. 55, 56.

(b) 3 Ves. 321.

(c) 4 Ves. 802.

Ward (a) the revocation was considered sufficient, because it was founded only on doubts of the testatrix whether the former legatees were still living, "and well provided for;" yet the general rule seems to be conceded by Sir *R. P. Arden*, Master of the Rolls, who refers to the well known case mentioned by *Cicero* (*De Orat.* Lib. 1. 38.). "Pater, credens filium suum esse mortuum, alterum instituit hæredem; filio domi redeunte, hujus institutionis vis est nulla" (b). *Attorney General v. Lloyd* (c) turned on a codicil made under an error respecting the illegality of a former devise; and the error was not considered sufficient to vitiate the codicil. In *Gordon v. Gordon* (d) a bequest to a natural child was sustained, where the testator in his will expressed his "belief" that the child was his; and the validity was held not to depend on the fact of its being really his child, because he chose to assume it, and to act upon that assumption; but Lord *Eldon* C. there admits that the failure of a reason, assigned positively, would have destroyed the legacy. Where a testator made a fresh will on the supposition that a former one was lost, and the old one was afterwards found, the Prerogative Court held the second to be no revocation of the first: *In the Goods of Richard Moresby* (e).

Jervis, contra. The devise in the codicil is absolute; and it matters not whether the alleged ground of

(a) 3 *Ves.* 327.

(b) The citation stands thus in *Cook v. Oakley*, 1 *P. Will.* 302.; but it is not in the language of *Cicero*, who does not state the result. The same case, with the decision in favour of the son, is alluded to by *Valerius Maximus*, lib. vii. c. 7. s. 1. See a decision similar to that in the text, cited from *Paulus*, in *Dig.* xxviii. tit. v. c. 92.

(c) 3 *Atk.* 551.

(d) 1 *Meriv.* 141.

(e) 1 *Hagg. Ec. Rep.* 378.

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the alteration be true or not. In *Attorney General v. Lloyd* (a) Lord Hardwicke says, "It is a very nice thing to say, that because the reason a man gives for his devise is false, therefore his devise shall fail." Suppose the devise had been to the testator's "son," or to his "chaste wife," there would have been no pretence for impugning its validity by disputing the paternity in the one case, or the chastity in the other. *Kennell v. Abbott* (b) shews this. The decision in that case was founded on the fraud of the legatee in representing himself to be single when he married the testatrix, and thereby obtaining a legacy as her husband. That is the doctrine of the *Digest*, xxxv. tit. 1. c. 72. s. 6. (c). In order to avoid the codicil, the error should have originated in a deceit practised on the testator: 1 *Powell on Devises*, p. 525. If the recital had been wholly omitted, then the codicil, however inconsistent with the will, would have been unquestionably good; and it would have been of no avail to shew, by extrinsic evidence, that the codicil was, in fact, founded on misapprehension. The cases cited on the other side are all on legacies of personal property; and, though there is perhaps no sound distinction between wills of land and of personalty, yet the ecclesiastical courts take more liberties in dealing with wills than the courts of law. They are, for the most part, cases in which a legacy was merely revoked without any substitution of another object in place of the first. *Campbell v. French* (d) was a case of this kind. There the revocation was indeed idle, if the legatees were really dead. [*Patteson J.* Where there is a residuary legatee,

(a) 3 *Atk.* 551.(b) 4 *Fes.* 802. See p. 809.(c) See also *Cod.* vi. tit. 24. c. 4.(d) 3 *Fes.* 322.

there

there is, in fact, a substitution.] The question is one of intention. Here the testatrix let the codicil stand for two years after the real circumstances of the case had come to her knowledge. She died therefore with a full knowledge of both law and fact, and without altering either the codicil or the recital. She has, therefore, made an absolute devise to *Henry*, and must be taken to have continued of the same mind at the time of her death, when she laboured under no misapprehension.

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R. V. Richards, in reply. If the codicil was bad when made, it cannot afterwards become a good one. The attempt to look at the mind of the party at the time of death, and not at the making of the will, was disallowed in *Marston v. Roe dem. Fox (a)*. If it were otherwise, at what precise period of time, during the two years, did the codicil become a good one? There must be republication, after full information, in order to set it up. Fraud was not the ground of the decision in *Campbell v. French (b)*, but the erroneous recital. As to the supposed case of a legacy to a man's "son," eo nomine, it would not take effect unless he were the son, or had the reputation of being so. The only question, in such cases, would be, whether the person were sufficiently described, and the exact truth of the description would be of secondary importance. The cases of *Campbell v. French (b)*, and *In the Goods of Moresby (c)*, are unanswered, and no authority has been produced against them. [Lord Denman C. J. In *The Lord Cheyne's Case (d)* there is a remark apparently at variance with the doctrine which you support. "If

(a) 8 A. & E. 14.

(b) 3 Ves. 522.

(c) 1 Hagg. Ec. Rep. 378.

(d) 5 Rep. 68 b.

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a man has two sons both baptised by the name of *John*, and conceiving that the elder (who had been long absent) is dead, devises his land by his will in writing to his son *John* generally, and in truth the elder is living in this case the younger son may in pleading or in evidence allege the devise to him; and if it be denied he may produce witnesses to prove his father's intent that he thought the other to be dead" (a). This seems to assume that the will, though made under error would nevertheless stand. *Patteson J.* It does not follow that the father would not have preferred the younger son, even if he had known that both were alive.]

LORD DENMAN C. J. The authorities cited on the part of the plaintiff shew that such a revocation as this is a conditional one. It is clear, on the face of the codicil, that the testatrix had no intention to interfere with her former disposition by the will. No intention to revoke it can be inferred. The doctrine in *The Lord Cheyne's Case* (b) is distinguishable; for we have there no revocation of a former will, nor any proof of what the testator would have done if he had known of his mistake.

LITLEDALE J. There is evidently no intention to leave the property away from the family of *Lewis*. The

(a) The report goes on thus: "no inconvenience can arise if an averment in such case be taken in case of a devise by will, for he who sees such will, whereby land is devised to his son *John*, cannot be deceived by any secret invisible averment: for when he sees the devise to his son *John*, he ought at his peril to enquire which *John* the testator intended which may easily be known by him who wrote the will, and others who were privy to his intent."

(b) 5 Rep. 68 b.

daughter

daughter was a posthumous child, and was probably **unknown** to the testatrix on that account. The codicil **was** intended to take effect only on failure of the original **devise**; and I am therefore of opinion, under the **circumstances**, that nothing passed by it, unless it may **possibly** hereafter have the effect of giving the property **to Henry** upon the failure of the original devise. As **to her** becoming acquainted with the fact after the codicil **was** made, this alone cannot set it up; otherwise it might **be** established by shewing that she lived only one day **after** she knew of the daughter's existence.

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PATTESON J. The meaning of the party at the time **of making** the codicil is alone to be looked at. At that **time** she knew nothing of the birth of a daughter; she **therefore** states that *Lewis* had "since departed this life **without** leaving any issue," that is, any issue now living. **We** must read this as if it had been, in terms, a devise **to Henry**, provided *Lewis* and his issue are really dead. If it had been so expressed, the subsequent information **would** clearly have made no difference. To give such **an effect** to a subsequent knowledge of the circumstances **would** be making a new codicil for the testatrix. All that Lord *Hardwicke* appears to mean in *Attorney General v. Lloyd (a)* is, that a man shall not die intestate **merely** because he gives a false reason for his bequest. This is not a dying intestate, but a restoration of the **original will**.

WILLIAMS J. This is admitted to be a question of **intention**. Now the codicil evidently does not proceed

(a) 3 Atk. 551.

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on any change of mind in regard to the original devisee. It only substitutes one devise for another, on the supposition that the first cannot take effect. The condition of revocation fails, because it appears that the party, who was always intended to be benefited, is capable of receiving the benefit intended.

Judgment for the plaintiff. —

Tuesday,
May 28th.

WILSON *against* HOARE and Eleven Others.

By a decree in Chancery, to which the lord of the manor was a party, it was ordered that, whenever the trustees of a certain parochial charity, consisting of copyhold of inheritance, should be reduced to five, the lord should, with the approbation of a Master, name nine others, being copyholders and inhabitants of the parish; that a surrender of the lands should then be made, and the fourteen be admitted, paying a reasonable

ASSUMPSIT by the Lord of the Manor of *Hampstead*, to recover the sum of 3900*l.* for reasonable fines due from defendants to plaintiff on their admission into certain customary tenements of the said manor, to hold to them, their heirs, and assigns, according to the custom. Money had and received, and account stated. Plea, the general issue.

fine. The trust became vacant by the death of ten, and resignation of two, of the trustees so appointed; and fourteen new ones were thereupon duly appointed and admitted. Held, (there being no special custom as to fines on such admittance) that a fine, made up of the sum of a geometrical series of nine terms, whose first term was the double value and common ratio $\frac{1}{2}$, with a deduction on account of the right to a renewal fine recurring on the failure of any nine lives out of fourteen, instead of nine absolutely, was reasonable.

Held, also, that the lord was not bound to make a further deduction by reason of his privilege of naming the lives, or of the mature ages of the trustees.

The reasonableness of such a fine, where the value of the land, and the amount of deduction, are undisputed, is not a question for the jury.

approbation

approbation of the master, nominate nine others, being **copyhold** tenants of the manor, and inhabitants of the **parish** of *Hampstead*, to be added to the five, and a new **surrender** of the charity lands should be made to their **use** on the same trusts; and that the lord should admit **them**, paying a reasonable fine (a).

In *July* 1826, upon the death of twelve, and resignation of two, of the trustees (b), the whole number of **fourteen**, including defendants, were admitted to the **charity** lands, being copyhold of inheritance; and the fine **was** eventually assessed at 3900*l.* Two of the trustees **had** since died. The annual value was admitted to be **1000*l.***; and the plaintiff's calculation of the fine was **founded** on the rule laid down in *Wilson v. Hoare* (c), **with** a further deduction in consequence of the renewal **being** on the failure of nine lives out of fourteen, and not **of** nine lives absolutely. The amount so deducted was, **in** fact, a larger one than the calculation of the plaintiff's **witnesses**, at the trial, required to be made. It was **proved** that the fines taken on admittances within the manor were arbitrary; and some evidence was adduced of a special custom to assess the fine, in the case of joint admittances, on the above principle; but the plaintiff's counsel contended that, independently of such evidence, the reasonableness of the fine was matter of law, and **that**, the value being admitted, it followed, as a consequence of law, that he was entitled to the sum assessed. On the part of the defendant it was contended that the rule, **as** laid down in *Wilson v. Hoare* (c), was inapplicable to a case like the present; that the deduction,

(a) A fuller statement of the foundation and decree will be found in *Wilson v. Hoare*, 2 B. & Ad. 350.

(b) The statement made by the Court in 2 B. & Ad. 350., as to the manner in which the vacancies had occurred, was admitted to be incorrect.

(c) 2 B. & Ad. 350.

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in respect of the expired lives being nine out of fourteen was not enough; and that a further deduction should be made in respect of the power of the lord to select the lives, and of the mature age of the parties, who would probably be selected as trustees of such a charity; that the value of the particular lives actually admitted should be taken into consideration; and that the reasonableness generally, was a question for the jury. His Lordship admitted evidence of the unreasonableness of the fine on the above grounds. The jury found that the lord was entitled to an arbitrary fine; that there was no special custom applicable to the case of joint tenants, or to the case of parties re-admitted upon a surrender; and that the fine assessed was unreasonable. A verdict was thereupon entered for the defendants, with leave to move to enter it for the plaintiff.

In the following term *D. Pollock* obtained a rule to enter a verdict for the plaintiff, and for a new trial on the grounds of misdirection and that the verdict was against evidence. In last *Easter* term (a),

Sir *John Campbell*, Attorney-General, *R. V. Richar* and *Carey*, shewed cause, and contended that, in evidence of custom having failed, the only question was as to the reasonableness of the fine; and that this was a question for the jury, who might find what was reasonable under the particular circumstances of the case. *Jackman v. Hoddesdon* (b). That the principle of calculation, as laid down in *Wilson v. Hoare* (c), was inapplicable, and would lead to injustice, especially when the lord had the choice of the lives, and the range

(a) May 1st, 1839, before Lord Denman C. J., *Littledale, Patten and Coleridge* Js.

(b) *Cro. Eliz.* 351

(c) 2 B. & Ad. 350.

select

selection was limited to a certain class of persons. In order to shew this, they repeated the arguments used on this head upon the discussion of that case, and relied upon certain calculations which had been submitted to the jury on behalf of the defendants, and which were founded on the number and ages of the trustees admitted, and the terms of the decree. They contended that, although the plaintiff, at the trial of the cause, disclaimed a right to take any fine in respect of any surviving trustees who should surrender for the mere purpose of being admitted with the new ones, yet, as any customary exemption, in such a case, was negatived by the jury, the disclaimer was voluntary and purely gratuitous, and, not being founded on any custom or general principle of law, would neither bind himself nor his heirs or assigns, so as to prevent him or them, on any future occasion, from claiming in respect of every one of the trustees admitted. That, although the Court of Exchequer Chamber, upon a bill of exceptions in this case (a), had awarded a venire de novo solely on the ground that the deduction had not been made, which the plaintiff had now allowed, it did not follow that it was the only deduction requisite, or that there was no other objection to the former assessment.

On the principle of assessment in the case of joint tenants, they cited the following cases: *Roe dem. Ash-ton v. Hutton* (b), *Holt C. J. in Fisher v. Wigg* (c), *Earl of Bath v. Abney* (d), *Attree v. Scutt* (e), *Garland v. Jekyll* (g), *The Dean and Chapter of Ely v. Caldecot* (h), *Rex v. The Lord of the Manor of Bonsall* (i),

- (a) See *post*, the report at the end of this case. (b) 2 *Wils.* 162.
 (c) 1 *Ld. Ray.* 631. (d) 1 *Burr.* 206.
 (e) 6 *East*, 484. See *Holloway v. Berkeley*, 6 *B. & C.* 2.
 (g) 2 *Bing.* 298. (h) 8 *Bing.* 439.
 (i) 3 *B. & C.* 173.

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Phypers v. Eburn (a). They also referred to *Kitch. on Courts*, 122. a. (ed. 1613,) cited in *Com. Dig. Copyhold* (H 1.), and *Wharton v. King (b)*.

D. Pollock and *John Scriven*, contra, admitted that the plaintiff must fail unless he could recover the whole fine demanded, but contended that, as the courts had taken upon themselves to say that two years' value was a reasonable fine for the admittance of one tenant, the question of reasonableness was no longer one of fact but of law. That the decision of the Exchequer Chamber, a right one, had, for the first time, introduced the question of the value of life into the calculation. [Lord Denman C. J. The question of reasonableness can hardly be withdrawn from the jury, if a deduction is to be made on that account. The testimony of actuaries must be submitted to them, in order to ascertain the amount of deduction.] The jury must find agreeably to the direction of the Judge. The fine was properly assessed on the principle laid down by this Court; and though the deduction required by the Judges in the Exchequer Chamber was questionable in principle, the plaintiff was content to submit to it; but the other deductions claimed were inadmissible. That the lives were indeed named by the lord; but his nomination was subject to the control of Chancery by the terms of the decree; and the value of the lives ought not to be considered beyond the extent sanctioned by the Court of Exchequer Chamber. That, although the present fine was large in consequence of the failure of resignation of all the trustees, so that the whole double value, viz. 2000*l.*, could be taken for the first life, 1000*l.* for the second, and so on, instances of this kind could

(a) 3 *New Ca.* 250.(b) 3 *Anstr.* 659.

never

never occur if the number was duly filled up as soon as it was reduced to five; and that, when the lord had to name and admit the next nine trustees, the fine could hardly exceed 120*l.*, unless the property was much improved (*a*). That, in fact, it was a hardship on the lord that, if the charity was properly managed, he never could take a full fine, but only a reversionary one, deducting the fines in respect of the surviving trustees.

Cur. adv. vult.

On this day the judgment of the Court was delivered by Lord DENMAN C. J. This long pending case has at length found its termination. It was an action for a fine of 3900*l.*, due to the lord of the manor of *Hampstead*, in respect of the admission of fourteen persons, joint trustees of a charity, to a copyhold estate within the manor.

(*a*) The fine was thus calculated:—

	£	s	d.
1st Life - - -	2000	0	0
2d Ditto - - -	1000	0	0
3d Ditto - - -	500	0	0
4th Ditto - - -	250	0	0
5th Ditto - - -	125	0	0
6th Ditto - - -	62	10	0
7th Ditto - - -	31	5	0
8th Ditto - - -	15	12	6
9th Ditto - - -	7	16	3
10th Ditto - - -	3	18	1
11th Ditto - - -	1	19	0
12th Ditto - - -	0	19	6
13th Ditto - - -	0	9	9
14th Ditto - - -	0	4	10

The fine, claimed by the plaintiff in the present case, consisted of the sum of the first nine terms of the above series. He stopped at the ninth, because, after the failure of nine lives, he would be entitled to a renewal fine. When the number so admitted should be reduced to five, the plaintiff professed to claim, in respect of the nine new lives, only a fine composed of all the above sums after the fifth life, viz. 124*l.* 14*s.* 11*d.*, which he called "a reversionary fine." But the court rolls did not appear to support the alleged custom in this respect.

This

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This estate was granted near 150 years ago: new trustees are directed, under a decree of the Court of Chancery of a date not much later, to be successively appointed by the lord, subject to the approbation of a Master of Chancery; and, whenever nine should have dropped, new ones were to be in like manner nominated and approved to complete the number.

It happened that all the fourteen were removed by death or resignation, and the whole number of fourteen was admitted.

The lord claimed a fine of upwards of 5000*l.*, calculated on the principle of two years' value for the first life, one year's value for the second, one third of the same amount for the third, and so downwards. My brother *Parke* tried the cause, and, thinking the fine calculated unreasonable, directed a nonsuit. Lord *Tenterden* and the Court agreed in his opinion; but, being much pressed, and (as they certainly understood) both parties, to lay down a rule for making the calculation, they took time for consideration, and then pronounced the rule. It was this: that the fine on the first life should be 2000*l.*, double the admitted yearly value of 1000*l.*; that on the second, the half of the sum, or the single yearly value; that on the third, half of that last amount, or 500*l.*; thus always halving the last addition to the fine in a descending series.

This was on the ordinary principle that an arbitrator's fine means a reasonable fine, and that such is the correct legal method of estimating a reasonable fine.

A second action having been brought for this amount of fine, my brother *Patteson*, on the trial (*a*), laid do

(a) *Sittings after Hilary term, 1839.* A short report of that trial may be found in *1 Scriven on Copyhold*, pp. 398, 394. (3d ed.)

this rule, and directed a verdict accordingly. But the defendants were still dissatisfied, and took the case by bill of exceptions to the Exchequer Chamber (a), on the ground that the learned Judge had refused to direct the jury that the fine ought to be reduced by the consideration that the renewal was to be, not on the dropping of nine specified lives, but on the dropping of nine out of fourteen specified lives, and would therefore occur sooner. There was but little discussion: but C. J. *Tindal* and Lord *Lyndhurst* both expressed an opinion that a reduction ought to have been made on the ground suggested; and the plaintiff appears to have acquiesced in it, and to have left the Court persuaded that he had its authority for claiming the fine so estimated, as in 2 *B. & Ad.* 350., and so reduced, as reasonable in point of law.

A venire de novo was then awarded, and the case came before me at Nisi Prius (b). Very different reports were brought from the opposite sides of what had occurred in the Court of Error: a new difficulty was started by the defendant, who recovered a verdict for want of the plaintiff's shewing himself to be thus entitled under any custom of the manor, and because the jury found the fine to be unreasonable. The Court, however, thought that the case did not turn upon the custom, and that the question, as to the reasonableness of the fine, was not for the jury; and a new trial was granted.

On this fourth trial Mr. *Pollock* rested the plaintiff's case on the law as propounded by my Brother *Parke* and this Court in the first instance, as qualified by what

(a) See note at the end of this case.

(b) February 16th, 1835.

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was afterwards introduced into it in the Exchequer Chamber.

He gave some evidence of a custom, where a second life was added, to exact half the fine that had been paid on the first; but the instances were not numerous: it proved but little as to any number of tenants admitted at once, and, on the whole, laid so slender a foundation for a custom, that we can by no means condemn the verdict finding that there was no proof of such custom. The plaintiff, however, proceeded to prove what deduction ought to be made in respect to the renewal based on the dropping of nine lives out of fourteen, and not nine specified lives; and, having established his point by undisputed evidence, claimed the verdict for a fine somewhat lower amount as a necessary consequence of law.

The defendant was allowed to give evidence, subject to what the Court should decide on its applicability, that that fine would be in fact unreasonable, from the lord's privilege of naming the lives, and the probability that, for that reason, and on account of the necessity of charity trustees being persons of mature age, the lives would fall more frequently than if they had been nominated by the grantees. This issue of fact the jury also found for the defendants; but the plaintiff contended that it was immaterial, and had leave to move that a verdict should be entered in his favour.

We are of opinion that this must now be done. The original grant by the lord must be considered as if it had been made and accepted by the trustees on the terms afterwards prescribed by the decree in Chancery. Whenever they applied for a renewal, they would be bound to pay an arbitrary, that is a reasonable, fine. V

ag

agree with the decision of this Court that a reasonable fine is to be calculated on the number of lives by beginning with two years' improved value, and halving it, and then halving the half of it, and so on, in a geometrical series, by which means the fine can never equal four years' improved value.

Whether we agree or not with the Exchequer Chamber, that the reduction adopted by that Court ought to be made, is immaterial for the present purpose, since the plaintiff is contented to reduce it on that principle.

Rule absolute to enter verdict for the plaintiff for 3900*l.* (a).

(a) See *Sheppard v. Woodford*, 5 M. & W. 608.

HOARE and Thirteen Others against WILSON.

The following is a note of the proceedings on the bill of exceptions, argued in error in the Exchequer Chamber (22d April 1834), before Tindal C. J., Lord Lyndhurst C. B., Parke and Gaselee Js., Vaughan and Bolland Bs., Alderson J. and Williams B.

The bill stated that an action had been brought by Wilson against Hoare and thirteen others, for a fine of 3985*l.* 10*s.*, assessed on the admittance of defendants to a copyhold in fee, and that issue was joined on a plea of non assumpsit, which came on to be tried before Patteson J., in the absence of Lord Denman C. J. That plaintiff then proved that the tenements were parcel of the manor, whereof plaintiff was the lord. That, in 1698, the then lord, with consent of the homage and of mere grace and favour, granted six acres of heath (being the property now called the Wells Charity estate), to hold to them, their heirs and assigns, at the will &c., by the yearly rent of 5*s.*, and the services due and accustomed, in trust for the poor of the parish of Hamptstead. It then stated the admittance of defendants, and assessment and demand of the above fine, and that the annual value of the tenement was 1000*l.* after deducting quit rents. It shewed that there had been, on an average, an admittance to the above tenements (besides admittances to additional parcels of land), every 21 years since 1698, and that the following were the fines then paid.

Where the lord admitted fourteen joint tenants to a copyhold of inheritance, with a power in himself to nominate nine others with the approbation of a Master in Chancery, when the number should be reduced to five, and thereupon to take a reasonable fine on such fresh admission of the old and new tenants: Held, by the Court of Exchequer Chamber, that the principle of assessment laid

down in *Wilson v. Hoare* (2 B. & Ad. 350.) was inapplicable, and that a deduction should be made on account of the right to take a new fine on the failure of nine lives out of fourteen, instead of nine absolutely.

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- In 1698. Fourteen trustees admitted - - - Fine £
 1730. Three surviving and eleven new trustees - [.
 1743. Three surviving and eleven new, on the death of ten
 and resignation of one - - -
 1763. Five surviving and nine new, on the death of nine
 1783. Two surviving and twelve new, on the death of
 eleven and resignation of one - - -
 1801. Four surviving and ten new, on the death of ten -

The bill then stated the ages of the defendants at the time of their missions, and the ages of the two retiring trustees; and that no build had been erected since 1801. That defendants then gave in evidence decree of 1739 (see ante, pp. 236, 237.), and proved, by an actuary, if copyhold premises be held on a single life of thirty years, the interest it would last, on an average, twenty-eight years; that, if one life, thirty, would be worth, on renewal, 3000*l.*, then two lives of the same would be worth 3490*l.*; and three such lives, 2608*l.*; and that the addition of any further number could not exceed 3000*l.* That, if 3000*l.* a reasonable fine on the admission of one life, the admission of four of the several ages of the defendants, to be renewed when reduced to would be 2111*l.*; and that the interest in fourteen lives, which are surrendered and re-admitted when reduced to five, is not so valuable as interest in nine absolute lives. That the judge then declared his opinion to the jury, that the fine assessed by the plaintiff was reasonable lawful, and that the evidence did not differ the case from the ordinary one of joint tenants admitted for their own lives. That defendants' counsel excepted to such opinion, and insisted that the right of the lord to put the new lives did make an essential difference with respect to the ages the parties put in, and the reasonableness of the fine. That the judge further declared his opinion to the jury, that it did not affect the case on point of law, that the fourteen trustees were admitted for the lives of nine among them who should soonest die, and not for nine absolute lives, and directed the jury to find for the plaintiff accordingly. Where the defendants' counsel insisted that the rule of law, which allowed more than two years' improved value to be taken on the admission of more than one tenant, ought not to be extended to a case where the best lives were in favour of the lord, and the lives, on which the fine was calculated, were the shortest out of a larger number; and that, as the plaintiff did not bring his case within the general custom of copyholds, and did not alleged nor proved any special custom in that behalf, the judge ought to have directed the jury to find for the plaintiff, but for the defendants, &c.

R. V. Richards, for the plaintiff in error, was stopped by the Court

Scriven Serjt. contra, contended that the fine was rightly estimated taking 3000*l.* for the first life, and so halving successively down to

ninth life inclusive. Strictly, the fine so calculated was 3992*l.* 3*s.* 9*d.* That this was the proper way where fourteen persons were admitted, with the prospect of renewal on the failure of nine lives. That the rule confining the fine to the double value did not apply where joint-tenants are admitted, or where other circumstances unfavourable to the lord intervened; *King v. Dillington* (1 *Freem. K. B.* and *C. P.* 496.). That the present case was one of great hardship; for, in the case of a renewable trust, there would be no fines on descent, demise, sale, settlement, mortgage, &c.; and a full fine could never be taken, if the trust was kept filled. That this was copyhold of inheritance, and not for lives, which was an important distinction. That the lord, instead of reaping advantage from the failure of all the tenants as in other cases, was here bound by the decree to renew the trust, and was thereby deprived of valuable casualties. That the original grant and decree reserved to him his "reasonable" fine, and all "services due and accustomed," and, therefore, was not intended to prejudice his rights. [*R. V. Richards.* It is a question whether any fine can be taken under such circumstances, without a special custom.]

Upon the argument, *Tindal C. J.* and *Lord Lyndhurst C. B.* intimated a strong opinion that, in assessing a reasonable fine, some deduction should be made in consideration that the renewal fine would be due on the failure, not of nine lives absolutely, but of nine of the worst lives out of fourteen. They further thought that the lord was not entitled to any increase in the fine by reason of any hardship or disadvantage occasioned by the terms of the decree to which he was a voluntary party. But the Court strongly urged the parties to refer the amount of the fine to a Master in Chancery.

On 29th May following (until which day the case stood over for the parties to agree), *TINDAL C. J.* said, — We decide against the application of the rule laid down by the Court of King's Bench. We think it does not apply under the circumstances. There must be a *venire de novo*. *LORD LYNDHURST.* It is a very plain case.

Venire de novo awarded.

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1889.

Wednesday,
May 29th.

The QUEEN *against* The Lord and Steward —
the Manor of OLD HALL.

Mandamus to the lord and steward of the manor of *O.* recited that, at a manor court holden before the steward in *May*, a plaint, in the nature of a writ of right, according to the custom &c., was presented to the steward, received by him, and enrolled in the court rolls: that, at a court holden in *August*, the demandant and tenant appeared, but that the steward refused to proceed upon the plaint; and the mandamus commanded the lord and the steward to proceed on the plaint.

MANDAMUS, tested 12th *June*, 1st *Victoria*, to the lord and steward of the manor of *Old Hall, East Bergholt*, in *Suffolk*. The inducement recited that at a court duly holden for the said manor, before the said steward, on or about 29th *May* 1835, a certain plaint, in the nature of a writ of right patent at common law, according to the custom of the manor, where *Thomas Blundell* was the demandant, and *Nathan Templeman* and *Robert Maitland* were the tenants, was presented to the steward on behalf of the said *T.* then and still claiming to be entitled, as customary heir of *Shadrach Blundell*, deceased, to certain copyhold property in *East Bergholt* in the said county, holden in the said manor, and that the said plaint was then and there received by the steward, and duly enrolled in the

Return, that at the court of *August* the tenant objected to the making the plaint erroneous and irregular on two grounds; whereupon it was considered and ordered by the Court that, for those errors, the plaint and proceedings should be set aside, reversed, annulled, and altogether held for nothing; and that the Court would take no further cognizance thereof; and thereupon the plaint and proceedings were set aside &c.; that, notwithstanding, a court was holden, in obedience to the mandamus, in the *October* following the issuing of the mandamus, whereat the tenant contended that, for the former objections and another, plaint presented in *May* was erroneous and irregular; and, upon those grounds, and because of the judgment of the court in *August*, he prayed that the plaint might be held for nothing; and that the court would take no further cognizance thereof; whereupon it appeared to the court that there was error in the plaint and proceedings, and that the court ought not to take cognizance or proceed thereon; and it was considered and adjudged that the plaint and proceedings were rightly set aside at the court of *August*, and that the court ought not to take further cognizance thereof.

Upon objection that the return was contradictory and repugnant, as shewing that the court proceeded in *October* upon a plaint already annulled, and that there was no judgment set forth,

Held, that the return was good, inasmuch as there was no contradiction, and the court appeared to have adjudged; and this court, upon the present proceeding, could not enquire whether or not the adjudication was erroneous or informal.

court

court rolls of the manor; and *N. T.* and *R. M.*, the tenants of the plaint, were thereupon summoned to appear at the then next general customary court baron of the manor, to be holden on 5th *August* then next, to answer the said *T. B.* in such plaint, according to the custom &c.; that, at the general customary court baron holden for the said manor before the steward, on the said 5th *August* 1835, one *John Penory Hume*, in pursuance of a warrant or power of attorney, duly executed by the said *T. B.* under his hand and seal, duly attested, authorising the said *J. P. H.* to appear for the said *T. B.*, as his attorney in the said plaint, theretofore duly entered on the rolls of the manor, then and there appeared on behalf of the said *T. B.*; and the said *N. T.* then and there appeared by *W. H.*, his attorney duly authorised in that behalf; and the said *R. M.* then and there also appeared in his proper person; whereupon the steward, according to the custom &c., ought immediately to have proceeded upon the plaint; and the said *J. P. H.*, on behalf of the said *T. B.*, then and there demanded of the steward to proceed thereon, according to the custom &c., but that the steward then and there wholly refused to proceed upon the plaint, nor had at any time since proceeded therein, although application had oftentimes been made to him, on behalf of the said *T. B.*, so to do; in contempt &c. The writ then commanded the lord and steward, and each of them, that immediately after the receipt of the writ they should proceed upon the said plaint so presented, &c., on the said 29th *May* 1835 as aforesaid, and that they and each of them should do every act necessary to be done by them, or either of them, in order to enable the said *T. B.* to prosecute

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prosecute *the said plaint*; or that they should shew
cause &c.

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Return (dated 2d November, 1st Victoria), that, at the
court holden for the said manor on 5th August 1835,
as in the writ mentioned, and on the appearance thereof
of *T. B.*, *N. T.*, and *R. M.* respectively, as in the writ
mentioned, *N. T.* and *R. M.* said that, in the making
of the plaint in the manner in the writ mentioned, and
in the proceedings thereon, there was an error and
irregularity in this, to wit that *T. B.* should have
entered the plaint in person, and not by attorney; and
that there was also an error and irregularity in this, to
wit that there was no warrant of attorney, by deed or
otherwise, to warrant the said *J. P. H.* to be attorney
for the said *T. B.* in entering the plaint; and the said
N. T. and *R. M.* thereupon prayed that the plaint and
proceedings aforesaid, for the errors and irregularities
aforesaid, and other errors in the pleadings aforesaid,
might be set aside, reversed, annulled, and held alto-
gether for nothing; and that the said court would take
no further cognizance of the plaint. Whereupon, the
matters aforesaid so alleged by the said *N. T.* and
R. M. for error being seen, and by the said court
understood, and deliberation being thereupon had, it
appeared to the court that, in the entering of the plaint,
and in the proceedings aforesaid, there was manifest
error; therefore it was considered and ordered by the
court there that, for the errors aforesaid, *the plaint and
proceedings should be set aside, reversed, annulled, and
altogether held for nothing*, and that the court there
would take no further cognizance of the plaint and pro-
ceedings, &c.: and thereupon accordingly the plaint

and

and proceedings were by the said court *set aside, reversed, annulled, and altogether held for nothing*; and that, notwithstanding the proceedings had on the plaint, and the said order and judgment of the court, a general customary court baron of the lord of the manor was holden in and for the same manor, before the said steward of the manor, in obedience to the writ of mandamus, on 24th October 1838, and the homage sworn were *J. K. and R. P.*; and, at the same court, on that day, came the said *T. B.* by his said alleged attorney, in the said writ mentioned; and thereupon also the said *N. T.* came by his attorney in the said writ mentioned, against the said *T. B.*, in the plea of land in the said writ mentioned; and the said *R. M.* also came in his own proper person against the said *T. B.* in that plea: and the said *N. T.* and *R. M.* said that the said court ought not further to take cognizance of, or proceed upon, the plaint in the said writ mentioned. First, because they said that, in making of the plaint, and in the proceedings aforesaid, there was an error and irregularity in this, to wit that the said *Thomas Blundell* was not, at the time of the entering of the plaint, or the receipt thereof by the steward, or the enrolment thereof as in the said writ of mandamus mentioned, nor was he then, a tenant of the manor, nor had he ever been admitted on the court rolls of the manor as tenant to the lord; and that that fact had been first discovered and ascertained by the said *N. T.* and *R. M.* since the holding of the court on 5th August; that there was also, as they had before alleged at the said court holden on 5th August 1835, &c. (repeating, secondly, and thirdly, the objections urged at the former court); and, fourthly, because it was considered and adjudged by the said court,

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court, so holden on 5th *August* 1835, that the *plaint and proceedings* under the same should be, and the same were then, by the said court, set aside, reversed, annulled, and altogether held for nothing, and the said court then considered and adjudged that they could take no further cognizance of the said *plaint and proceedings*; and the said *N. T. and R. M.* prayed that the *plaint and proceedings* aforesaid, for the errors and irregularities, and reasons aforesaid, and other errors in the *proceedings* aforesaid, might be held altogether for nothing, and that the said court would not take further cognizance of the said *plaint and proceedings*, or further proceed therein. Whereupon, the matters aforesaid above alleged by *N. T. and R. M.* being seen, and by the said court, so held on 24th *October* 1838, understood, and deliberation being thereupon had, it appeared to that said court that in the making of the *plaint* aforesaid, and in the *proceedings* aforesaid, there was manifest error, and also that the court *ought not to take further cognizance of the plaint and proceedings, or further proceed therein*. Therefore it was *considered and adjudged*, by the court so held on 24th *October* 1838, that, for the errors aforesaid, firstly, secondly, and thirdly above alleged, *the plaint and proceedings aforesaid were rightly set aside, reversed, annulled, and held for nothing at the court so held on 5th August 1835, as aforesaid*; and it was also *considered and adjudged* by the court that, for the errors and reasons aforesaid, they *ought not and could not, according to law and the practice of the said court baron, take further cognizance of the said plaint and proceedings, or further proceed therein*. Wherefore, for the reasons above alleged, the lord and steward could not, nor could either of them,
proceed

proceed upon the said plaint, as by the said writ they were commanded.

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Stephen Serjt. now moved (on concilium) that the return might be quashed and a peremptory mandamus awarded. First, the return is repugnant and contradictory. The writ commands the lord and steward to proceed upon the plaint, or to shew cause for not doing so. The return sets forth, apparently, a cause for the Court not proceeding, yet states that the Court did proceed. If the plea, in the first instance, was rightly "altogether held for nothing," the return is contradictory in stating that the Court afterwards gave judgment upon it. This objection is not answered by saying that the allegation as to the proceedings subsequent to the writ of mandamus is redundant: the defendants ought not to embarrass the record by matter which makes it impossible for the prosecutor to plead, or to know what it is that he has to answer. In *Regina v. Mayor, &c. of Norwich* (a) the mandamus was to admit one *Dunch*, an alderman; the return alleged that he was elected alderman, but that the mayor and aldermen (having power so to do, as shewn in the return) refused him for not having received the sacrament within a year before his election; and, at the end of the return, it was averred *quod non fuit electus*. It was admitted that, upon the matter shewn, the election was void, and that the return, if confined to that, would have been good. "But in regard the return was repugnant and contradictory, the Court granted a peremptory mandamus. The Chief Justice said, the Court could not believe them, when, by their return, first they admit an election and

(a) 2 *Ld. Raym.* 1244.

avoid

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avoid it, and then deny that *Dunch* was elected." A *Powell* J. said, "If the return be not contradictory, is very inveigling; the Court cannot tell what to rely upon." And, upon *Powys* J. doubting whether, since appeared, that the election was void, a peremptory mandamus could be granted, "the Chief Justice said it need not appear; for the Court could not tell what to believe when the return was contradictory to itself." The Court awarded a peremptory mandamus. This case was cited in *Rex v. The Mayor of London* (a); and the Court there said, "It was contended that the return was inconsistent: if we were of that opinion, then the return ought to be quashed."

Secondly (b), it was not necessary, at any rate so far as regarded this suit, that the prosecutor should have been admitted tenant. As to this, he cited *Co. Cop.* s. 41. (p. 94.; ed. 1764.); *Calthorp's Readings*, (ed. 1635.) (c); *Gilbert on Tenures*, 282, 283; 1 *J. Abr.* 505. *Copyhold*, (X.), (Y.); *Gyppyn v. Bunney* 4 *Yearb. Tr.* 38. *Ed.* 3., fol. 13. A, B. (e).

Thirdly, the prosecutor might appear by attorney. As to this, he cited the statute of *Westminster the second* 1 stat. 13 *Ed.* 1. c. 10.; *Com. Dig. Attorney*, (B. *Jacob's Comp. Court Keeper*, 210, 227. (8th ed.); *Practice of Courts Leet, and Courts Baron: published from Manuscripts of Sir William Scroggs*, 196. (4th ed.); *Comp. Cop.* s. 35. (p. 80.; ed. 1764.); *Kitchin on Copyhold*

(a) 9 B. & C. 1.

(b) The judgment of the Court renders it unnecessary to give the arguments, at length, upon any besides the first objection.

(c) "The relation between the lord of a manor and the copyholder as his tenant."

(d) *Cro. Eliz.* 504.

(e) On this point, *Littledale* J. referred to 1 *Scriv. Cop.* 376. (3d ed.)

Lect. &c., 511, 512. (5th ed.); *Fitzherb. Nat. Brev.* 11 N., 26 D.; and he stated that in *Angell v. Angell* (a) both parties appeared by attorney.

Fourthly, it was not necessary that the warrant of attorney should be entered. As to this, he cited *Yearb. Pasch.* 4 Ed. 4. fol. 13 A. pl. 21.; *Com. Dig. Attorney*, (B 8.); *Holt C. J.* in an *Anonymous* (b) case; 3 *Vin. Abr.* 295., *Attorney*, (I.).

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Cresswell contra. First, the grounds alleged are not repugnant, as in *Rex v. Mayor, &c., of Norwich* (c); the whole may be, and in fact is, true: and therefore the reason given for quashing the return in that case, that the Court could not tell what to believe, does not apply here, since the Court may, and on this return must, believe the whole. It would be otherwise if the return were contradictory, as the Court said in *Rex v. The Mayor of London* (d). But, as appears by the subsequent proceedings in *Rex v. The Mayor and Aldermen of London* (e), any number of consistent causes may be returned; and, if any one constitute a good answer, there will be no peremptory mandamus. Now here the Court below, having already held the plaint to be merely null, met, in obedience to the writ of mandamus, and, upon deliberation, found themselves compelled to abide by their former holding. The plaint being at an end, they could not proceed, as is indeed argued on the other side. This they set out substantially; and there is no repugnancy in form or fact. Supposing the Court to have decided erroneously, that is no ground for quashing the return; they might simply have returned

(a) 3 *Bing.* 393, 397.(b) 1 *Salk.* 86. (pl. 3.).(c) 2 *Ld. Raym.* 1244.(d) 9 *B. & C.* 1.(e) 3 *B. & Ad.* 255. [See pp. 271, 272.]

that

1839. that they had proceeded. In *Rex v. Richardson* (a) mandamus went to two justices to proceed and give judgment in a complaint; they returned that they had heard and determined the complaint; and the return was allowed. So in *Rex v. The Justices of the West Riding of Yorkshire* (b), where the writ commanded the defendants to give judgment, and they returned a judgment which, it was contended, was imperfect, the Court allowed the return, saying that, even if the judgment below was erroneous, that was not the proper mode of correcting the error, but that the prosecutor must bring a writ of error. Here, if a peremptory mandamus were to issue, the defendants have not the means of obeying it, judgment having been already given.

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(He then argued the other points; citing, on the second, *Doe dem. Tofield v. Tofield* (c).)

Stephen Serjt. in reply. The decision in *Rex v. Mayor, &c., of Norwich* (d) does not proceed on so narrow a ground as that suggested on the other side: the Court there appear to have considered that the different ways of stating the legal result made it impossible for them to see on what the defendants meant to rely. And, although they say that a peremptory mandamus must go where the Court cannot tell what they are to believe, they do not say that it shall not go in any case where they do know what to believe. But, further, in the present case the Court cannot know whether the suit was at an end on the 5th of August or not. If the return were simply as in *Rex v. Richardson* (a) and *Rex v. The Justices of the West Riding of*

(a) 1 Wils. 21.

(c) 11 East, 246.

(b) 7 T. R. 467.

(d) 2 Ld. Raym. 1244.

Yorkshire

Warkshire (a), the objection would not arise: for in these cases there was a substantive judgment set out as the sole answer to the writ; so that there was a remedy by the regular method of correcting the judgment. Where the words "considered and adjudged" are not enough to make a regular judgment: there should be a judgment that the demandant take nothing and the defendant go quit.

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LORD DENMAN C. J. The first objection to this return is, that it is repugnant and contradictory. I cannot see that it is so. Upon the mere reading of the return, it is clear that the Court intended to pronounce a judgment; and what they pronounced was a judgment. It was, however, said that the plaintiff was revived. But the prosecutor cannot complain of the question having been again entertained upon his own demand. The defendants might, indeed, have returned that they had already acted: but, if they choose to hear again and confirm what they did before, that introduces no contradiction; and the case does not fall within *Rex v. Mayor, &c., of Norwich* (b). Then what more has this Court to do? The defendants say that they have done what we require them to do: and the question, whether or not what they have done be erroneous, cannot be entered into in this proceeding. We cannot tell that, if they were ordered to act again, they would not act as before. We do not sit here as a court of error. The return is therefore, in my opinion, perfectly good.

LITLEDALE J. I also am of opinion that the return is sufficient. As to the question of repugnancy, I think

(a) 7 T. R. 467.

(b) 2 Ld. Raym. 1244.

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it is as plain as possible. A proceeding takes place in ~~in~~
August 1835, when an objection is made to the pro—
secutor's suit, which the manor court hold to be valid—
Then the prosecutor comes here for a mandamus, ~~—~~
directing the manor court to proceed. In obedience to ~~the~~
the mandamus, a manor court is held in *October*. Now ~~—~~
that proceeding could not be like entertaining a plaint ~~—~~
de novo; for they are commanded to proceed on the ~~—~~
original plaint. Several objections are taken in the ~~—~~
manor court; and that court, on the old and new ob—
jections, confirm what they had before done, and say ~~—~~
that they can proceed no farther. The defendants ~~—~~
therefore, have held a Court, have heard the parties,
and have given judgment. What is this Court to do?
The defendants have not refused, but have obeyed by
hearing and adjudging. I say nothing of the way in
which the judgment is entered up; we have nothing to
do with that. If it be erroneous, there may be some
equitable or other remedy. Nor do I decide on the
answer given here to the objections. We have nothing
to do with them now: it is sufficient that the manor
court has adjudicated.

PATTESON J. I have no difficulty in understanding
this return; and I see neither repugnancy nor contra—
diction in it. It states the determination which the
manor court came to upon attempting to continue the
proceedings. What they mean I can understand;
though I have more difficulty in understanding the pro—
ceedings themselves. I do not know whether there was
a plea or an assignment of errors: but it is clear that
what was done was meant for a judgment. That may
be bad in form and substance: but we are not a court
of

of error; nor, if we were, do I know that we could quash the judgment in this proceeding.

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WILLIAMS J. It is suggested that there is a repugnancy in the return, because it shews that, the proceedings having been received, the manor court came to the same judgment as before. But the mandamus called on them to revive the proceeding; and they have come to a determination which they think final. Whether that be formal or informal I do not say; neither is it material. My brother *Stephen* appears to admit that, if the return shew an actual judgment, it is enough: which indeed appears from *Rex v. The Justices of the West Riding of Yorkshire* (a) and *Rex v. Richardson* (b).

Return confirmed.

(a) 7 T. R. 467.

(b) 1 Wils. 21.

The QUEEN against The Guardians of the Poor of the WALLINGFORD Union, in the Counties of BERKS and OXFORD.

Wednesday,
May 29th.

ON appeal against a poor rate, made 4th January 1838, whereby the appellants were rated in the respondent parish to the relief of the poor, the sessions confirmed the rate, subject to the opinion of this Court on the following case.

On the hearing of the appeal, it was proved that the respondent parish and twenty-eight other parishes together form one union (pursuant to the provisions of

The guardians of an union, formed under stat. 4 & 5 W. 4. c. 76. s. 26., comprehending the parish of M. and others, built a work-house in M., for the employment of the poor, under stat. 4 & 5 W. 4. c. 76. s. 23.

Held, that the guardians were rateable in the parish of M., as occupiers of the work-house. Though it was built on land which, from the nature of the former occupation, had not previously been rated.

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stat. 4 & 5 W. 4. c. 76.), called the *Wallingford Union* formed by the Poor Law Commissioners on 2d J 1835; and that the appellants are the guardians there elected pursuant to the said statute.

That the property, in respect of which they are sought to be rated, consists of the union workhouse of the union, with its appurtenances, together with two acres of ground, used as a garden to the workhouse, and joining the same, but not being a distinct property.

That, previously to the formation of the union, respondent parish, together with the parishes of *St. Peter* and *St. Leonard*, in the borough of *Wallingford*, were jointly possessed of a workhouse for the reception of the paupers of the said three united parishes, on the site which the said union workhouse has been erected in the manner hereinafter mentioned. That, after the formation of the *Wallingford Union*, the old union of the said three united parishes was declared void by the Poor Law Commissioners; and the old workhouse, belonging to the three united parishes, was, with the concurrence of the Poor Law Commissioners, and in pursuance of stat. 4 & 5 W. 4. c. 76., and of stat. 5 & 6 W. 4. c. 69. ("to facilitate the conveyance of workhouses and other property of parishes and of incorporations and unions of parishes in *England* and *Wales*"), sold by the visitor and guardians of the said three united parishes, and, with the like concurrence of the commissioners, purchased by, and conveyed to, the guardians of the *Wallingford Union*. That a piece of ground, containing about two acres, adjacent to the said workhouse was also purchased by the guardians for the sum of 190*l.* 10*s.*, and conveyed to them, by the order and direction of the commissioners, and in pursuance of

said statutes. That the union workhouse was erected, partly on the ground belonging to the old workhouse, and partly on a portion of the said two acres of ground, by the guardians, at the cost of 5150*l.*, including the said sum of 190*l.* 10*s.*, under the like order and directions, and with the approbation, of the commissioners.

That the old workhouse was not rated to the relief of the respondent parish; but that the said two acres of land were rated to the relief of the poor of the said parish before the formation of the union: but the produce thereof is now applied to the maintenance of the pauper inmates.

That the union workhouse is situate in the respondent parish. That it is applied solely to the reception and maintenance of the poor of the union, including therein as well poor persons falling sick or otherwise becoming destitute in the union, although not settled therein, as the settled inhabitants of the union.

That, in addition to the apartments occupied by the poor persons received into the union, and appropriated solely to their use, the building also contains apartments occupied by the master and matron; but that such apartments are necessary for the purposes of the union, to carry on the work of the union, and to superintend the paupers belonging thereto.

That the union workhouse also contains a board-room, where the guardians meet once in every week, in order to transact the business of the union, and which is used solely for that purpose.

That the union workhouse contains a mill affixed to the freehold, whereat the pauper inmates are employed to grind flour for hire; but that only four men can work at the mill at the same time; and, also, that all the

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money so earned is solely applied in discharge of ordinary expenses of the workhouse, and the maintenance of the paupers therein.

That a piece of garden ground is attached to the union workhouse, and cultivated by the paupers who are inmates of the house; but that its produce is consumed by the pauper inmates of the union workhouse.

That the names of the occupiers of the union workhouse are described in the said rate in these words, *Board of Guardians of Wallingford Union*. That the name of the owner is described in the said rate in these words, *viz., Parishes comprising the union*. That the premises intended to be rated are described in the said rate in these words, *viz., Union workhouse, board-room, officers' apartments, yard, garden, and premises*.

The question for the opinion of the Court was, whether the union workhouse and premises, or any of them were, under the circumstances, liable to be rated to the relief of the poor in the respondent parish or not.

The case was now argued (a).

Talfourd Serjt., *Carrington, Bros*, and *M. Smith*, in support of the order of sessions. By stat. 43 *Eliz. c. 2. s. 5.* churchwardens and overseers are empowered to build, within their own parish, houses of dwelling for the impotent poor. And by stat. 9 *G. 1. c. 7. s. 4.* they may purchase or hire houses in their own parish for workhouses; or parishes may unite for the purpose, in which case the workhouse need not be in any of the united parishes; *Rex v. St. Peter and St. Paul, Bath* (b). Neither of these statutes contains any p

(a) Before Lord Denman C. J., *Littledale, Patteson*, and *Williams*

(b) *Cald.* 213.

vision with respect to the rates of such houses. Then stat. 22 G. 3. c. 83. (*Gilbert's Act*), which created the guardians for united parishes, and (by sect. 21) incorporated them, enables the guardians to provide houses; and, by sect. 18, it is enacted that the houses shall be in the parish, if they be for one parish only, or, if they be for several united parishes, then in one of such parishes, unless consent to a different arrangement be given as there provided: and, by sect. 5, no united parish is to be more than ten miles from the house. By sect. 19, "such houses, buildings, and lands, shall be free from all parochial and parliamentary taxes, except such taxes, and to such amount, as they were assessed at the time they were first taken and applied to the purposes" of the act. If, therefore, the premises in question in the present case had been taken by parishes united under stat. 22 G. 3. c. 83., the rate would have been merely as before the taking. Then, by stat. 4 & 5 W. 4. c. 76. s. 26., unions are provided for on a larger scale and for extended purposes. The twenty-third and following sections enable the commissioners, under certain prescribed limitations, to direct the overseers or guardians of a parish or union to build, purchase, hire, enlarge, &c., workhouses, without any restriction as to place; and sect. 31 repeals sect. 5 of stat. 22 G. 3. c. 83., and sect. 1 of stat. 56 G. 3. c. 129., which imposed such restrictions. Now the Court will not interfere with the discretion of the commissioners in this respect; *Rex v. The Poor Law Commissioners, In the matter of the Newport Union* (a): and, if such property were not rateable when situated out of the parish for which it was taken,

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(a) 6 A. & E. 54.

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it would at any time be in the power of the commissioners to exempt property from rateability. This case must be governed by the decision in *Governors of the Bristol Poor v. Wait (a)*. There the occupation was as much for a public purpose as here. The objection to the rate there was grounded on the occupation being for a public purpose; but the answer given was that wherever it was attempted to exempt property from its prima facie liability to rate on account of its being devoted to a public purpose, it was necessary to show that there was no occupation by the party rated, where the crown, by its servants, occupies merely as trustee for the public of the whole kingdom. The mere absence of profit to the particular party does not exempt from rate; *Rex v. St. Giles, York (b)*. The present case cannot be distinguished from *Governors of the Bristol Poor v. Wait (a)* on the ground that the property there was situated without the parish for which it was taken, but here it is within the union; that rule, as before pointed out, would enable the commissioners always to exempt property from rateability. But, even if that distinction were important, it affects only one of the twenty-nine parishes of the union, and therefore goes only to amount, the union being beneficial occupiers in respect of twenty-eight parishes, each of which, by stat. 4 & 5 W. 4. c. 76. s. 26., is separately chargeable for its own poor. The respondent parish would be unequally rated, if a part of the property within it were exempted from contributing to the particular parish on the ground of a benefit diffused among all the twenty-nine. Stat. 22 G. 3. c. 83. s. 19. recognises the general

(a) 5 A. & E. 1.

(b) 3 B. & Ad. 573.

liability

liability to rate by the language of the express partial exemption. The occupation here is not for a public purpose in any sense in which the occupation of a railroad or dock is not so. Such occupation has never been held to create an exemption, except where the freights have been applied exclusively to a specific public purpose by express parliamentary provision; as in *Rex v. The Commissioners of Salter's Load Sluice* (a), *Rex v. Liverpool* (b), *Rex v. The Trustees of the River Weaver Navigation* (c), *Rex v. The Commissioners for Lighting Beverley* (d), *Regina v. The Mayor &c. of Liverpool* (e). Occupation exclusively for religious or charitable purposes forms a distinct ground of exemption; but the occupation for the employment of the poor is not a charitable purpose, as appears from *Governors of the Bristol Poor v. Wait* (g).

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Sir J. Campbell, Attorney-General, *W. J. Alexander*, and *Tyrwhitt*, contra. The hardship upon the respondent parish, if any, could not vary the law; but, in fact, there is here no such hardship, the workhouse never having been previously rated. The guardians here are not inhabitants; they must be rated, if at all, as occupiers, under stat. 43 *Eliz. c. 2. s. 1.*, the union not being under stat. 22 *G. 3. c. 83.* They are now a corporation by stat. 5 & 6 *W. 4. c. 69. s. 7.* The criterion suggested on the other side, of application of the funds under statute, will not account for all the cases, as *Lord Amherst v. Lord Sommers* (h) (recognised by *Lord Kenyon* in *Eckersall v. Briggs* (i)), *Holford v.*

(a) 4 T. R. 730.

(c) 7 B. & C. 70. not. (c).

(e) 9 A. & E. 435. 3. C. 1 P. & D. 334.

(h) 2 T. R. 372.

(b) 7 B. & C. 61.

(d) 6 A. & E. 645.

(g) 5 A. & E. 1.

(i) 4 T. R. 6. See p. 9.

1839. *Copeland (a), Rex v. Woodward (b).* But in fact occupation here is for a public purpose; and the property is used exclusively for purposes defined by statute as in the cases cited on the other side. The provisions of stat. 4 & 5 W. 4. c. 76. control the purposes to which this property can be applied. Sect. 15, &c., give to orders of the commissioners the effect of laws; and sect. 21 of those orders (c) the relief to be given to paupers is under strict regulations. The present is not like that of a hospital established or supported by voluntary charity, where there could be no claim of exemption which might not be urged by any person who chose to devote his house to the entertainment of the poor in want. Thus in *Rex v. St. Giles, York (d)*, *Re Agar (e)*, and *Rex v. The Mayor, &c. of York (g)*, particular application of the funds was voluntary. In the cases upon occupation for public purposes were expressly recognised in *Governors of the Bristol Poor v. Wait (h)*, and they have lately been upheld in *Rex v. The Mayor, &c. of Liverpool (i)*. The rateal attaches, as was said in *Governors of the Bristol Poor v. Wait (h)*, "so soon as any independent occupation for private advantage is discoverable." That was the case in *Eckersall v. Briggs (k)* and *Rex v. Terra Firma (l)*. Here no such occupation can be shewn. With reference to *Governors of the Bristol Poor v. Wait (h)*, if that case were reconsidered, it might be urged that impositions, which were relied upon in argument by the

(a) 3 B. & P. 129.

(b) 5 T. R. 79.

(c) See *Archbold on the Act for the Amendment of the Poor* p. 179. (5th ed.).

(d) 3 B. & Ad. 573.

(e) 14 East, 256.

(g) 6 A. & E. 419.

(h) 5 A. & E. 1.

(i) 9 A. & E. 435.

(k) 4 T. R. 6.

(l) 3 East, 506.

successful party, were not noticed in the judgment of the Court. It may, however, be distinguished from the present. The application of the property to the employment of the poor was there perfectly voluntary; the governors might have maintained the poor in any other way. Again, the Court there laid great stress upon a circumstance which does not exist here, namely, that the premises were not in the parish for which they were taken. *Rex v. The Commissioners for lighting Beverley (a)* was indeed decided partly on a principle which cannot be applied here, namely, that by rating the property the parish would lose as much as it could gain. But that circumstance did not exist in *Regina v. The Mayor &c. of Liverpool (b)*, which is precisely in point, as it was decided on the ground that the funds were disposed of by statute for public purposes. And, in that case, the Court mentions the disturbance of the proportions to be contributed by different parishes as a difficulty which might arise, but which was not sufficient to control the rule. Besides, cases might be suggested where the rating such property would be wholly circuitous, as, if no other parish in the union had any paupers; and it must always be circuitous to some extent. It is true that a part of the property here was rated formerly. That, however, is not a circumstance which can impose a rateability in the present state of the property, as appears from Lord Mansfield's judgment in *Rex v. St. Luke's Hospital (c)*, and from *Rex v. Waldo (d)*.

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Cur. adv. vult.

Lord DENMAN C. J., in the following vacation (June 20th, 1839), delivered the judgment of the Court.

(a) 6 A. & E. 645.

(b) 9 A. & E. 435.

(c) 2 Bur. 1064.

(d) Cald. 358.

The

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The question is, whether a workhouse, situate in one of many parishes which have been formed into an union, is rateable, in the hands of the guardians, towards the relief of the poor of the parish in which it is.

To shew that it is not so rateable, the class of cases was referred to in which the Court has held property exempt from rating, by reason of its being wholly unproductive to the occupiers, commencing with *Rex v. Commissioners of Salter's Load Sluice* (a), and ending with the late decision in favour of the *Corporation of Liverpool* (b). The great leading principle of these cases we take to be this : that, when that person who must be deemed the actual occupier is merely a trustee for others, and is prevented by the law from deriving any benefit whatever from the occupation, that person cannot be considered as the occupier for the purpose of being rated ; the act of *Elizabeth* plainly supposing both control over the property and the power of enjoying it.

Thus, in the *Salter's Load Sluice* case (a), where tolls were to be applied for the several purposes of the act, and for no other whatever, Lord *Kenyon* said, " There is property, which is the subject of a rate : but no occupier of it." The *Liverpool* case (c) may be considered as the same with that just cited, which it expressly follows ; and the *Weaver Navigation* case (d) in the same volume agrees with them entirely : *Rex v. Sculcoates* (e) fully acknowledges the principle, on which also we lately decided *Rex v. The Commissioners for Lighting Beverley* (g)

(a) 4 T. R. 730.

(b) *Regina v. The Mayor &c. of Liverpool*, 9 A. & E. 435.

(c) *Rex v. Liverpool*, 7 B. & C. 61.

(d) *Rex v. The Trustees of the River Weaver Navigation*, 7 B. & C. 70.
note (c).

(e) 12 East, 40.

(g) 6 A. & E. 645.

and

and the very important case of *Rex v. The Mayor &c. of Liverpool* (a). Under the circumstances which appeared on all these occasions, there is no impropriety in saying that the public was the occupier, made such by act of parliament, and receiving by the same authority all the profits of the property; while those who would otherwise have been the occupiers are in the situation of public servants, receivers and managers for the public benefit, without any interest of their own. So it was argued here. The workhouse is hired by the guardians under authority of the late statute for the public purpose of maintaining the poor, and with no private advantage to the occupiers. But, though the maintenance of the poor be a public purpose, the maintenance of the poor of this particular district is a burden on that district alone; the occupation is not beneficial to the guardians individually; but the most advantageous mode of relieving their poor is an advantage to that body. We decided accordingly in *Governors of the Poor of Bristol v. Wait* (b); which can only be distinguished from the case before us by the local situation of this property, which is within one of the parishes composing the union. But one parish is not more a separate body from another than the parish of *Saint Mary the More*, in *Wallingford*, is from the union which annexes it to twenty-eight other parishes.

It is not necessary to make any observation on the intermediate cases of property voluntarily appropriated to religious and charitable purposes. We decide on the ground that this property, not being devoted to a public purpose, and being beneficially occupied, is subject to the poor-rate.

Order of sessions confirmed.

(a) 9 A. & E. 435. S. C. 1 P. & D. 334.

(b) 5 A. & E. 1.

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Wednesday,
May 29th.

The QUEEN *against* The Inhabitants
CAVERSWALL.

A settlement
cannot be
gained under
6 G. 4. c. 57.
by renting and
occupying a
tenement
jointly with
another person.

ON an appeal against an order of removal from the parish of *Burslem*, in the county of *Stafford*, to the parish of *Caverswall* in the same county, the said order was confirmed, subject to the opinion of the Court upon the following case.

It was admitted on the part of the appellant that the pauper's late husband was settled in the parish of *Caverswall*, at the time he went to reside in the parish of *Burslem*. It was admitted on the part of the respondents that the said husband, during the years 1829, 1830, 1831, rented, *bonâ fide*, a dwelling in the parish of *Burslem* at the rent of 7*l.* a year, and occupied and paid the rent and poors' rates for the same during the whole of that time under that renting; that, during all the time he so rented and occupied the said dwelling house, he also rented, *bonâ fide*, a building called a *Potwork*, or some other building, jointly with one *E. A.* in the same parish, from another lord, at the rent of 15*l.* a year and upwards, and occupied the same jointly with the said *E. A.* under such renting, and paid a moiety, at least, of the rent and rates, due for the same, during the whole of that time.

The question for the consideration of the Court was, whether, under the circumstances above stated, the pauper's husband, and from him the pauper himself, had acquired a settlement in the parish of *Burslem*.
6 G. 4. c. 57.

F. V.

F. V. Lee, in support of the order of sessions. Supposing that two tenements in the same parish may be joined for the purpose of giving a settlement within 6 G. 4. c. 57., as to which *Rex v. Iver* (a) must perhaps be regarded as decisive (though the language of *Taunton J.* in *Rex v. Macclesfield* (b) points the other way), still there is no authority to shew that an occupation jointly with another person is enough to satisfy the words of the statute. The expression, "separate and distinct" dwelling-house or building, means separate and distinct as regards other persons; and this construction has been put upon it by *Patteson* and *Williams Js.* in *Rex v. Wootton* (c), and again by *Patteson J.* in *Rex v. Great and Little Usworth and North Bid-dick* (d).

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Whateley, contra. That the tenements may be united is settled by *Rex v. North Collingham* (e), *Rex v. Stow* (g), *Rex v. Tadcaster* (h), and *Rex v. Iver* (a). As to the joint occupancy, the dicta of *Patteson* and *Williams Js.* in the cases cited were not necessary for the judgments given in them; nor does the language of the former strictly apply to this case. *Patteson J.* there seems to refer to the case of a lodger or person occupying only part of a house. In *Rex v. Great Wakering* (i) a joint renting was held insufficient only because the entire value of the tenement was not large enough to admit of being divided between two: if it had been worth 20*l.* a year, it is evident that the Court was prepared to

(a) 1 A. & E. 228.

(c) 1 A. & E. 232.

(e) 1 B. & C. 578.

(h) 4 B. & Ad. 703.

(b) 2 B. & Ad. 873.

(d) 5 A. & E. 261.

(g) 4 B. & C. 87.

(i) 5 B. & Ad. 971.

hold

1839. hold the occupation sufficient. *Rex v. Kniveton* (a) *2*
 also in favour of the settlement; for the statute 6 G. 4
 c. 57. makes no difference in this respect.

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 ants of
 CAVERSWALL.

LORD DENMAN C. J. None of the authorities are exactly in point; but I have no doubt upon the construction of the act. It requires the party to have the house or building separately to his own use, and not jointly with any one else. He must be the sole occupier.

LITLEDALE J. The statute evidently contemplates sole occupancy. It would occasion difficulties, if several could claim a settlement by a joint occupation of the same tenement under its provisions.

PATTESON and WILLIAMS Js. concurred.

Order confirmed.

(a) 2 Bur. S. C. 499.

Thursday,
 May 30th.

The QUEEN against PITT.

Under stat.
 11 G. 4. &
 1 W. 4. c. 60.
 s. 8., the Court
 of Chancery,
 upon the Mas-
 ter's report,
 made an order
 declaring that
 the heir of W.,
 legal tenant in fee of copyhold premises, could not be found, that W. held as trustee, and that B. was entitled to the equitable fee; and appointing G. trustee to convey or surrender the legal estate.

MAULE had obtained a rule in *Trinity* term, 1838, calling on the lord and steward of the manor of *Minty*, in *Gloucestershire*, to shew cause why a mandamus should not issue, commanding them, or one of them, to accept the surrender of *Richard Goodrich* of certain

This Court refused to compel the lord, by mandamus, to accept G.'s surrender, on the ground that (assuming the statute to apply to copyholds) the Court of Chancery could compel the performance of whatever was requisite, and was better able than this Court to regulate the rights of the parties.

Especially as it appeared that B.'s right was disputed, and that the lord had seized quousque and assigned for a valuable consideration.

customary

customary or copyhold hereditaments within the said manor.

From the affidavits in support of the rule it appeared that, by an order of the Court of Chancery, dated 27th *March* 1835, on the petition of Sir *Henry Loraine Baker*, Bart., it was referred to the Master to enquire and state to the Court whether *John Wade*, deceased, was a trustee of the legal estate in the one sixth part of the copyhold hereditaments in question, within the meaning of stat. 11 G. 4. & 1 W. 4. c. 60. (a); and, if the Master should find that he was such trustee, then it was ordered that he should enquire and state to the Court who was his heir at law, or whether it were unknown or uncertain whether such heir were living or dead; and, in case the Master should find that it was unknown or uncertain &c., then it was ordered that he should approve of some proper person to be appointed in the stead of such heir at law to convey the legal estate in the said one sixth part. That the Master made his report, dated 15th *November* 1835, certifying that he had been attended by the petitioner's solicitor, and had proceeded &c. The report of the Master was then stated, which set out the evidence laid before him, the result of which was that *John Wade* was admitted to hold the whole of the copyhold premises to him and his heirs for ever, according to the custom of the manor; that he afterwards surrendered to the use of his will: that, by a memorandum indorsed on the copy of court-roll, dated 16th *July* 1788, he declared that, as to one sixth part, he was only trus-

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(a) "For amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees; and for enabling courts of equity to give effect to their decrees and orders in certain cases."

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tee, and that this part belonged to *Mary Storke*, for her life, and, after her death, to the right heirs of her deceased husband *Samuel Storke*. That *John Wade* died, having duly made a will and codicil, without disposing of the legal estate in the said one sixth part: that thereupon the legal estate in the same vested in his customary heir at law *ex parte maternâ*. The report then deduced the title to the equitable fee in the one sixth part to Sir *H. L. Baker*, the petitioner. That the heir of *John Wade*, *ex parte maternâ*, could not be found. That the Master then found that *John Wade* was a trustee of the one sixth part within the act; that it was not known or discovered who was his customary heir; and that, the petitioner (Sir *H. L. Baker*) having proposed *R. Goodrich* as a trustee instead of such heir, he, the Master, approved of *R. Goodrich* as a proper person to be appointed instead of such heir to convey or surrender the legal estate in the one sixth part. The affidavits further stated that the Master of the Rolls, by order of *January 21, 1836*, confirmed the Master's report, and ordered that *R. Goodrich* should be appointed trustee, instead of the customary heir of *John Wade*, to convey or surrender the legal estate of the one sixth part pursuant to the act.

The affidavits also stated that proclamation was made at three successive general courts *halimot* or courts baron of the manor, in 1818, 1819, and 1820, for the customary heir of *John Wade* to appear and be admitted tenant of the one sixth part, and, he not appearing, the lord of the manor seized the one sixth part into his hands *quousque*.

The petitioner, Sir *H. L. Baker*, stated, on affidavit, his claim to the beneficial interest in the one sixth part, as customary heir at law of &c. (according to the title

deduced in the Master's report); and that, since the order, he had applied to the steward to appoint a court for admitting *R. Goodrich*, in order to his surrendering; but that the steward had not appointed the court. Details as to the application and refusal to appoint the court, and of an application and refusal to accept *Goodrich's* surrender, were also given, which it is not necessary to set forth here.

The affidavits in answer stated that the order of reference to the Master, the Master's report, and the order of the Master of the Rolls, were obtained *ex parte*; that the defendants had no evidence of Sir *H. L. Baker's* title, and did not believe that he had one. Details as to this were added, and also some statements qualifying the supposed demand and refusal (*a*). Also that, since the seizure by the lord, he had granted away, for a valuable consideration, part of the said copyhold lands, which part was still vested in the grantee or his assignee.

Kelly now shewed cause. This application is founded on stat. 11 G. 4. & 1 W. 4. c. 60., the title of which shews that the object was to give jurisdiction to the Court of Chancery; and sect. 8 (*b*), upon which the rule

(*a*) Some arguments as to the sufficiency of the demand and refusal are omitted in this report, the judgment of the Court having proceeded on another ground.

(*b*) Which enacts, " That where any person seised of any land upon any trust shall be out of the jurisdiction of or not amenable to the process of the Court of Chancery, or it shall be uncertain, where there were several trustees, which of them was the survivor, or it shall be uncertain whether the trustee last known to have been seised as aforesaid be living or dead, or, if known to be dead, it shall not be known who is his heir; or if any trustee seised as aforesaid, or the heir of any such trustee, shall neglect or refuse to convey such land for the space of twenty-eight days

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rule is framed, applies only to cases where there is a question as to the party having the beneficial interest, and, in those cases, enables the Court of Chancery to give such party the means of calling in the legal estate. Here there is a dispute as to the equitable title of the petitioner; and the Master's report was merely upon *ipse* parte evidence. This Court is, therefore, practically required to give the petitioner the equitable estate, though he may have no title, at any rate none known to this Court. The remedy for the petitioner, if any, is in Chancery. If the estate were freehold, that Court would direct the conveyance; it may therefore direct the proceedings of the copyhold court here, if the section applies to copyholds at all. That, however, may be questioned. It contains no mention of admittance or surrender; and it simply authorizes the party appointed in lieu of the trustee to convey. In the interpretation clause, sect. 2, it is enacted that the provisions relating to land shall extend to and include "any manor, messuage, tenement, hereditament, or real property, of whatever tenure is" but that does not go the length of giving the appointed trustee all the rights of a copyhold tenant. The lord is entitled to refuse the surrender of any party who has not been admitted. [*Littledale J.* In *1 Scriven on Copyholds*, 7. (a) it is said, "Special customary courts are

next after a proper deed for making such conveyance shall have been tendered for his execution by, or by an agent duly authorized by, any person entitled to require the same; then and in every or any such case it shall be lawful for the said Court of Chancery to direct any person whom such Court may think proper to appoint for that purpose in the place of the trustee or heir, to convey such land to such person and in such manner as the said Court shall think proper; and every such conveyance shall be as effectual as if the trustees seised as aforesaid, or his heir, had made and executed the same."

(a) 3d ed.

also

also sometimes called for the purpose of effecting the proposed transfer of copyhold property by the admission of the new tenant, (the purchaser, or mortgagee, or, perhaps, trustee for particular objects,) but at such courts it is not regular to enter any presentment, or make any proclamation in furtherance of the acts of any prior general court." Can the lord be compelled by mandamus to hold such a special court?] Here, also, the lord having, as he was entitled to do, seised quousquè, and sold a part, the rights of parties will be complicated; and interests will arise which a court of chancery is more competent to regulate than a court of common law.

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Cresswell and Whatley, contrà. The rule is properly framed; for, till the surrender has taken place, the surrenderee cannot be admitted, as there will be another tenant on the roll. The interpretation clause, sect. 2, is intentionally so worded as to include copyhold as well as other tenures. [*Patteson J.* referred to the language of stat. 4 & 5 W. 4. c. 23. s. 6.] No objection can now be taken to the result of the Master's report, confirmed by the Court of Chancery: it must be assumed that all was properly done. Then the Court of Chancery has merely to name a party to take the place of the heir: this Court must treat the rights of such nominee as they would have treated those of the heir: the nominee is a sort of heir special. Now, the heir may surrender without admittance, though a surrenderee cannot. The trustee, when invested with his full legal rights, could be directed to act, by the Court of Chancery, under sect. 11; but this Court will compel the lord to allow to the heir special whatever the heir would have been entitled to demand.

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demand. If it be said that the Lord Chancellor has power to direct the lord, independently of the statute, the remedy now sought is at all events the simplest.

LORD DENMAN C. J. This is a motion for the purpose of carrying into effect the provisions of s. 11 G. 4. & 1 W. 4. c. 60. s. 8. That section enables the Court of Chancery to appoint a person to make conveyance in the place of the trustee or heir. It is said that sect. 2 shews that the statute applies to copyholds; and that, as the proper conveyance of a copyhold is by way of surrender, the lord should be compelled to accept the surrender. If that be so, I cannot see why the Court of Chancery has not the power to do what is now asked for. We are not to intrude our jurisdiction into a case where the Court of Chancery has already acted, and has power to go on; but should leave the Court to do what the act enables it to do, which comprehends all that is necessary for carrying into effect the substitution of a person for an heir not found. Even the word "convey" did not occur in sect. 8, yet it would follow, from the general jurisdiction of the Court of Chancery, that, when an act enables them to appoint the substitute, they may do all necessary to give effect to the appointment. We therefore ought not to interfere, but to leave the matter to that jurisdiction which is here more capable than we are to do justice, more especially in a case where the lord sets up an interest and there are disputed rights into which we cannot satisfactorily examine.

LITLEDALE J. It is only of late that this Court has interfered by mandamus to compel the lord of a manor
 manor

manor to admit a copyholder. In *Rex v. Rennett* (a) the Court, though it refused the mandamus in the particular case, said they would grant it if a proper case were laid before them; and *Rex v. The Borough of Midhurst* (b) is referred to in the report, which, however, was not the case of a mandamus commanding the lord of the manor to admit a tenant. The Court of Chancery has, however, original jurisdiction. This is an application to compel the lord to accept a surrender. It is said, in 1 *Scriven on Copyholds*, 623. &c. (c), that it was doubted whether a lord was compellable by mandamus to accept a surrender; but he shews that such a mandamus lies. However, the Court of Chancery having original jurisdiction (d), we think this a much fitter case for that Court than for us, in order that it may carry into effect the purposes of the act. It can call all the parties before itself. Here, the lord has seized, which creates our difficulty. Then, if the person appointed be an heir special, it may be said that there should be a finding by the homage. The whole proceeding is anomalous, and much fitter for the Court of Chancery than for us.

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PATTESON J. We are asked to consider *Goodrich* as heir at law: if he be not, we have no power to interfere. The remedy by mandamus to compel a lord to admit is comparatively modern; and I cannot find that it was ever exercised except in favour of an heir or tenant actually on the roll. A surrender by *Goodrich* would not effect the admittance of any one; if the real heir surrendered, his surrenderee would still have to pay

(a) 2 *T. R.* 197.(b) 1 *Wils.* 283.

(c) 3d ed.

(d) See 1 *Scriv. Cop.* 631. (3d ed.).

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the fine. My difficulty, however, is in saying that we can look on *Goodrich* as the heir at law. If he be heir, it is only under the statute; and then the case is peculiarly one of equity and trust, and especially within the cognizance of the Court of Chancery. We cannot see our way in the matter. There is no legal estate in *Goodrich*, except by the operation of the act; but the act does not say that the person named shall have the same legal estate as the heir at law had, but only that his conveyance shall be as effectual as if executed by the actual trustee, or his heir. We cannot therefore act as we are asked; the legislative provision does not go far enough for that purpose. But there is no want of remedy. The Court of Chancery has full power to do all that is requisite for giving the parties interested the benefit of the enactment.

WILLIAMS J. The objection that one party was not heard has been answered: we must presume that the Court of Chancery acted rightly. But is there any ground for our interference? The Court of Chancery has full jurisdiction to compel the performance of all that ought to be done.

Rule discharged.

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**The QUEEN against The Mayor, Aldermen, and
Burgesses of the Borough of BRIDGEWATER.**

SIR W. W. FOLLETT had obtained a rule, in *Michaelmas* term, 1837, calling upon the defendants to shew cause why a certiorari should not issue, directed to them, to remove certain orders or resolutions made at a meeting of the council of the borough of *Bridge-water*, holden 23d *January* 1837, for defending, at the expense of the council, three rules nisi for quo warrantos severally against three persons named *Champion*, *Bate*, and *Clark*; and for payment by the treasurer of the borough fund to *Benjamin Lovibond* of 100*l.* on account of the costs of defending the rules: Also certain other like orders or resolutions made at the same time for opposing, at the expense of the council, a rule nisi, calling on a person named *Chapman* to shew cause why an information for misdemeanour should not be exhibited against him; and for payment by the treasurer to *Lovibond* of 90*l.*, on account of the costs of defending that rule; and all proceedings had thereon: Notice to be given to the council, or some of them, and to the town clerk and treasurer of the borough fund.

The rule was obtained on the affidavit of *Matthew Paramore*, who described himself therein as "gentleman, and one of the burgesses" of the borough of *Bridge-water*, and stated the following facts. In *Michaelmas* term, 1836, this Court granted rules nisi for quo

granted a certiorari to bring up the orders of the previous town council, and quashed them.

A town council ordered a payment from the borough fund, for defraying the expenses of opposing two rules, one for a quo warranto against a party who had been declared duly elected a councillor and had accepted the office, for exercising that office; the other for a criminal information against an alderman of the borough, for alleged misconduct at an election of councillors.

The payments were made by the treasurer, and his accounts audited. Afterwards, stat. 7 W. 4. & 1 Vict. c. 78. passed.

The Court, under sect. 44, upon the affidavit of a burgess who applied in pursuance of the instructions of a subsequent town council,

1839. warrantos against *Champion, Bate, and Clark*, for exercising the office of councillors of the borough, they having been declared to be duly elected at the election of November 1836, and having accepted office; and also a rule nisi for a criminal information against *John Chapman*, a justice and alderman of the borough, for misdemeanours in his office of alderman (a). On 23d January 1837, two resolutions were passed by the town council: first, that the three rules for quo warrantos should be defended at the expense of the council; that *Benjamin Lovibond*, the attorney who had already conducted the defence, should be instructed to continue it; that the costs already incurred should be paid out of the borough fund; and that the treasurer should be directed to pay *Lovibond* 100*l.* on account of the costs: secondly, a similar resolution for opposing the rule against *Chapman*, and for paying 90*l.* in respect thereof. The treasurer afterwards paid the 190*l.* to *Lovibond*, for which, as the deponent was informed and believed, *Lovibond* had not accounted to the town council. The three rules for quo warrantos were afterwards made absolute, informations filed, judgments suffered by default, and judgment of ouster signed in all three cases. The rule against *Chapman* was discharged, on payment of costs to the prosecutor by *Chapman*.

In the affidavits in answer, it was deposed that the 190*l.* had been paid to *Lovibond* by the treasurer in January 1837, after, and pursuant to, the resolutions

(a) In the second resolution of the council, afterwards mentioned, it was stated that these were "misdemeanours alleged to have been committed by him in discharge of his duty as the presiding alderman at the election of councillors" for one of the wards of the borough, in November 1836.

that

that the treasurer's accounts, containing items of these payments, were duly audited in *March* 1837: that, in *August* 1837, the treasurer resigned his office, and paid over the balance remaining in his hands to his successor: that the present application was made at the instance of the now town council, and at their expense, and under the direction of a committee appointed by them for the purpose, in pursuance of a resolution passed by the town council in *November* 1837: that *Paramore* was an attorney, professionally engaged by that committee to conduct the present proceedings: and that, in *December* 1837, the town council resolved not to oppose the proceedings.

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In last *Hilary* term (a),

Erle shewed cause, on behalf of the party who was treasurer in *January* 1837 and until *August* 1837. First, this is an application by the town council for the purpose of defeating their own order; for, though the order was made in *January* 1837, and the rule was obtained on behalf of a town council, which, as to some of the individuals, was new, in *Michaelmas* term, 1837, yet the body is legally the same. The town council is thus applying against itself. Secondly, no certiorari lies. Stat. 5 & 6 *W. 4. c. 76. s. 132.* enacts that no order made in pursuance of that act shall be removed by certiorari (b). It is true that stat. 7 *W. 4. & 1 Vict. c. 78. s. 44.* enacts that, "whereas it is expedient to give all persons interested in the borough

(a) *January* 29th, 1839. Before Lord Denman C. J., *Littledale, Williams, and Coleridge* Js.

(b) See *Regina v. The Justices of Rippon*, 7 *A. & E.* 417.

fund

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fund of every borough a more direct and easy remedy for any misapplication of such fund," "any order of the council of any borough for the payment of any sum of money from or out of the borough fund of any borough may be removed into the Court of King's Bench by writ of certiorari, to be moved for according to the usual practice of the said Court with respect to writs of certiorari." But that act was passed 17th *July* 1837; the orders in question were made on 23d *January* 1837; and the treasurer's accounts were audited in *March* 1837. The attempt is, therefore, to give a retrospective operation to stat. 7 *W. 4. & 1 Vict. c. 78. s. 44.*, which contains no words to such an effect. Sect. 1 of the same act provides that nothing in the act shall extend to invalidate a payment *bonâ fide* made before its passing. Thirdly, the treasurer had no power to disobey the order of the council; and he is not now to be questioned for payments duly ordered, made, and allowed.

Sir *W. W. Follett* contra. First, the case is precisely that which the legislature had in view in passing stat. 7 *W. 4. & 1 Vict. c. 78. s. 44.* Every burgess has a right, now, to call in question orders for payments not made in pursuance of stat. 5 & 6 *W. 4. c. 76. s. 92.* The Court will not interfere with this right on the suggestion that the party is enforcing it at the instance of the town council. It is said that this is merely an application by the town council against itself; but the application opposed by counsel instructed by parties opposing the town council. Secondly, sect. 44 of stat. 7 *W. & 1 Vict. c. 78.* is, no doubt, as to the certior prospective only, but it is not so confined as to order which is the subject of the writ: "any or

may be removed by certiorari. The act will be construed liberally, having been passed to amend defects in the earlier act. The order complained of was illegal from the first; the remedy is certainly new, but nothing is made illegal which was previously legal; in which sense only the retrospective effect would be objectionable. Thirdly, it does not appear that the treasurer will suffer in any way by this rule being made absolute. [Lord Denman C. J. What will you do with the order when you have it?] The parties may not be prepared to answer that question. [Lord Denman C. J. The answer might guide us in the exercise of our discretion, if any is given to us. *Littledale J.* It would be going a good way if the accounts were now to be reviewed.]

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LORD DENMAN C. J. It must be understood that we think this a very important application, and consider the town council right in making it; but, as to the decision, we must pause.

Cur. adv. vult.

LORD DENMAN C. J., in this term (*June 6th*), delivered the judgment of the Court. This was a motion for a certiorari to remove an order for payment of costs of some quo warrantos, and of a rule for a criminal information against some person for affronting a magistrate (*a*). The rule must be made absolute, these being clearly no public purposes. But an objection was taken in this case that the treasurer had settled and rendered all his accounts before stat. 7 W. 4. & 1 Vict. c. 78. (*July 1837*), which gives power

(a) See p. 282., *antè*, note (a).

to

1839. to remove accounts, the certiorari having been taken away by the former statute. But the later act, reciting that it is expedient to give all persons interested in the borough fund of every borough a direct and easy remedy for any misapplication of such fund, enacted that any order of the council of any borough for the payment of any sum of money from or out of the borough fund of any borough may be removed into the Court of King's Bench by certiorari, not confining it to orders thereafter to be made, nor to such accounts as were unsettled at the time of passing the act.

Rule absolute

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The orders were brought up, and a rule obtained for quashing them for insufficiency; against which, the following *Trinity* term (*Wednesday, June 3d, 184*

Sir *J. Campbell*, Attorney-General, shewed cause, and contended that the application of the borough fund was not illegal, but was ordered in the bona fide exercise of the discretion of the council, and that no corrupt motives were alleged; and that the individuals elected were compelled to take office under penalty: and, on this part of the case, he referred to *The Attorney-General v. The Mayor of Norwich* (a). He relied also on the point previously made in opposition to the rule. [*Patteson J.* This town council is not only composed of different in-

(a) 2 *Myl. & Cr.* 406. And see *The Attorney-General v. Corporation of Norwich*, 1 *Keen*, 700.

dividuals

dividuals from those composing the former one, but it is also a different body. The corporation is indeed the same; but that consists of the mayor, aldermen, and burgesses. The town council is not the corporation.]

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Sir *W. W. Follett*, contra. *The Attorney-General v. The Mayor of Norwich* (a) turned entirely on the pleadings. The Lord Chancellor allowed the demurrer, because, consistently with the language of the pleadings, it was possible that the expenses had been incurred in defending the existence of the corporation. Here, such a state of things cannot exist. The town council has no interest in defending the offices of particular individuals, and consequently has no discretionary power of paying the costs of the defence. The other points were disposed of on granting the rule.

Lord DENMAN C. J. Without reference to our former judgment, it is clear that these orders are bad. The parties were interested as individuals; they did not embody any interest of the corporation.

LITLEDALE J. concurred.

PATTESON J. There may be a hardship on an individual, in subjecting him to legal proceedings for accepting an office which he is fineable for not accepting. But, if we were to admit that the borough funds may be applied to defend his office, the consequence would be that the town council would be bound to defend all parties against whom such proceedings were taken, enemies as well as friends.

(a) 2 Myl. & Cr. 406. And see *The Attorney-General v. Corporation of Norwich*, 1 Keen, 700.

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WILLIAMS J. With regard to the rule for a criminal information, how can it be for the interest of the borough that an individual who has committed a delinquency should not be punished?

Rule absolute.—

The QUEEN *against* WATKINSON.

The election of a chief constable for a wapentake in the *West Riding of Yorkshire* having been made at a petty sessions of the justices usually acting for the wapentake, without notice to the other justices of the riding: Held, that such election was void, and that a chief constable might be elected at a subsequent quarter sessions.

INFORMATION in the nature of quo warranto, calling upon the defendant to shew by what authority he claimed to have, &c., the office of a chief constable of the wapentake of *Staincliffe with Ewcross*, in the *West Riding of Yorkshire*. By the pleadings (which made part of the case) the following issues were raised.

First, whether the defendant was duly appointed one of the two chief constables for the said wapentake at a general court of quarter sessions holden at *Pontefract*, in and for the said riding, on *April 2d*, 1832. Secondly, whether, at such sessions, he was duly admitted to that office. The third, fourth, and fifth issues were upon the question, whether one *Christopher Edmondson* was not duly appointed to be such chief constable at a special petty sessions of the justices of the peace acting for the said wapentake, duly called and holden for the election of such chief constable on 29th *August* 1831.

On the trial before *Tindal C. J.* at the *Yorkshire* Summer assizes, 1835, a verdict was found for the Crown upon all the issues, subject to the opinion of this Court upon the following case.

There are two chief constables appointed for the wapentake of *Staincliffe with Ewcross*; and the office of one of those chief constables became vacant on 5th *July* 1831,

1831, by the death of *William Carr*. A meeting of the magistrates usually acting for the wapentake was duly called and holden on 29th *August* 1831, for the express purpose of electing a chief constable in the room of *Carr*. At this meeting, *Edmondson* was appointed, by the majority of the justices present, to be such chief constable, and was recommended by them to be sworn into that office at the next general quarter sessions for the riding. At those sessions *Edmondson* duly applied to the Court, and requested to be sworn into the office, pursuant to his appointment; which the Court refused, and adjourned the matter to the *Pontefract* quarter sessions to be holden on 2d *April* 1832. At those sessions the defendant was elected and admitted to the office.

The only question of fact in dispute upon the trial was, whether *Edmondson* had, at the petty sessions on 29th *August* 1831, been actually elected and appointed a chief constable in the place of *Carr*, and recommended to be sworn in at the next quarter sessions, or whether he had, on that occasion, been merely recommended to the justices to be assembled at the next sessions, as a fit person to be appointed chief constable by the said sessions. The jury found that *Edmondson* had, at the special sessions, been elected and appointed to the said office and recommended to be sworn in at the quarter sessions, and not merely recommended to the justices at those sessions to be by them elected.

It was admitted, on behalf of the Crown, that, supposing the justices in petty sessions had not the power to make such an appointment, but that that power resided in the justices in quarter sessions, the defendant had been duly elected, appointed, and admitted at the *Pontefract* quarter sessions holden on 2d *April* 1832.

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The questions for the opinion of this Court were,
Whether the election and appointment of *Edmondson*
at the special petty sessions holden on 29th *August*,
1831, was or was not a valid election and appoint-
ment.

Or whether the defendant was duly elected, ap-
pointed, and admitted at the said general quarter ses-
sions for the riding, holden at *Pontefract* on 2d *April*,
1832.

The case was argued in last *Michaelmas* term (a).

Starkie, for the Crown. The principal question is, whether *Edmondson* was duly elected chief constable by the justices acting for the wapentake, on 29th *August* 1831. It will be argued, on the other side, that the justices on that occasion acted without authority; and that the election should have been at quarter sessions. If the power to elect be vested in the justices, quæ justices, as representing the ancient conservators of the peace, then the court of quarter sessions has nothing to do with the election: the members of that court could act simply as individual justices. The statute of *Winchester*, 2 stat. 13 *Ed.* 1. c. 6., mentions the office of constables, two to be chosen in every hundred and franchise, to view armour; the office must therefore have existed before (b). Justices of peace, as the office now is, were first created by 2 stat. 1 *Ed.* 3. c. 16., which enacts that in every county good men and lawful shall be assigned to keep the peace (c). The office is further regulated by stat. 4 *Ed.* 3. c. 2., and 2 stat. 18 *Ed.* 3. c. 2. The

(a) On the 10th and 14th of *November* 1838, before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

(b) See *Regina v. Wyat*, 1 *Salk.* 175, 381.

(c) See 2 *Inst.* 558.

ist enacts "that two or three of the best of reputation in the counties shall be assigned keepers of the peace by the king's commission, and at what time need shall be, the same, with other wise and learned in the law, shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same counties, and to inflict punishment," &c. The duties of justices of the peace are, afterwards, laid down in stat. 34 *Ed. 3. c. 1.*, including the duty "to hear and determine at the king's suit all manner of felonies and trespasses done in the same county." Then stat. 12 *R. 2. c. 10.* enacts "that in every commission of the justices of peace, there shall be assigned but six justices, with the justices of assises, and that the said six justices shall keep their sessions in every quarter of the year at the least, and by three days, if need be." That statute gave no fresh jurisdiction, and took none away. By it, the sessions were to be held quarterly at least: but they might still be held oftener. It appears from this that the election of constables, if made by justices in the character of conservators of the peace, could not, up to the time of *Richard the Second*, be in the court of quarter sessions; nor does any provision restrict the election to that court. Sessions may be holden upon summons, under a precept of two justices; and that seems to be the most regular course, though sessions may be held without summons; *Lambard, Eirenarcha*, book 4. ch. 2. (p. 380., ed. 1619); *Com. Dig. Justices of Peace*, (D 3.). A precept by two justices cannot be superseded by other justices of peace; *Com. Dig. Justices of Peace*, (D 3.), citing *Lambard, Eirenarcha*, book 4. ch. 2. p. 383. In *Rex v. Hewson* (a) *Holt C. J.* said, "How can justices of peace

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(a) 12 *Mod.* 180.

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make a constable, who is an officer at common law, as they only by statute, only there may have been such usage from the neglect of those to whom it properly belonged; perhaps there may be some old statute of it, which is lost. Ancient usage for three or four hundred years is good evidence of a law. If an act of parliament be lost or embezzled, the law remains still. May be the conservators of the peace did it at common law." [Coleridge J. By 2 stat. 13 Ed. 1. c. 6., the constables are to be chosen in every hundred and franchise to make the view of armour; and they are to present defaults "before justices assigned." What justices were these?] Probably justices in eyre: the high constables could not then be bound to attend at quarter sessions.

It may, however, be argued that the appointment has now devolved upon the magistrates, because the sheriffs' torns and courts leet have ceased to exercise the power. The history of the appointment has been the subject of controversy; but it seems clear that the petty constables were anciently appointed by freeholders (at the leet, where there was one), and high constables at the sheriff's torn held in the hundred: 4 *Inst.* 265, 267. It appears, indeed, to have been the opinion of Lord Coke, in 4 *Inst.* 267., and, at the same time at least, of Lord Hale, 2 *P. C.* 96. ed. 18 (citing *Sharrock v. Hannemer* (a)), that the office of high constable was created by 2 stat. 13 Ed. 1. c. 6.: other authorities, however, shew that it was a common law office: *Fitzherbert and Crompton's Office, &c., of Justices of Peace, &c.*, 222 b. (ed. 1606), *Powell J.* and *Holt C.*

(a) *Cro. Eliz.* 375.

in *Regina v. Wyatt* (a), Lord Hale in *Rex v. King* (b) (citing *Samoy's Case*), Holt C. J. in *Regina v. Jennings* (c), *Com. Dig. Leet*, (M 5.). In *Ritson's Office of Constable*, p. 13. (2d ed.), it is said, "Nothing can be more certain than that the constable of the hundred, or high constable, whether he be allowed an officer at the common law or not, was instituted long before that statute" (*Winchester*); and he gives, from the *Adversaria* of *Wat's* edition of *Matthew Paris* (d), a writ or mandate of the time of 36 H. 3., which seems to have been the foundation of the sixth chapter of the statute of *Winchester*: "in singulis verò hundredis constituatur unus capitalis constabularius, ad cujus mandatum omnes jurati ad arma de hundredis suis convenient," &c. The courts leet create petty constables still; but in their default, and only then, any two justices of peace were to act, by stat. 13 & 14 C. 2. c. 12. s. 15.: *The Case of the Constables of Limington* (e), *Case of the Constable of Stepney* (g), *Case of the Village of Chorley* (h). And in *Rex v. Hewson* (i) Holt C. J. says, "If there be no leet at all, then you must go to the sheriff's tourn." Now, if the office of high constable existed before 2 stat. 19 Ed. 1. c. 6., and that statute merely enlarged the powers, creating also, perhaps, two high constables in lieu of one, the justices of peace may have succeeded to the power of appointing in lieu of the sheriff's torn holden in the hundred, their

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(a) 2 *Ld. Raym.* 1189. S. C. 1 *Salk.* 175, 380.

(b) 3 *Keb.* 197, 230. S. C. as *Keene's Case*, *Freem. K. B. and C. P.* 348.

(c) 11 *Mod.* 215.

(d) See the whole writ at the end of the *Adversaria*.

(e) 2 *Str.* 798.

(g) 1 *Bulst.* 174.

(h) 1 *Salk.* 175.

(i) 12 *Mod.* 180.

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commission charging them to "cause to be kept ordinances and statutes for the good of the peace, and for preservation of the same." But then the justices who elect the officer for the hundred in lieu of the sheriff's torn in the hundred should clearly be the justices of the hundred. This seems to have been understood by the legislature in the time of *Henry VI.* since the act for regulating *Wales*, stat. 34 & 35 *H. c.* 26. s. 70., enacts "that the said justices of the peace or two of them at the least, whereof one of them is to be of the *quorum*, shall appoint and name, for every hundred within the limits of their commission two substantial gentlemen or yeomen to be the chief constables of the hundred wherein they inhabit; and the two constables of every hundred shall have a special regard to the conservation of the king's peace, and shall and may do and use their offices in all and singular things, as is used by the high constables of the hundreds in *England*, and shall be bound to all things as the high constables of the hundreds in *England* be bound to do." The high constables are the officers of the justices of the hundred, who issue their precepts to them: the duties of the high constable are not confined to the business of the court of quarter sessions. It is a common law principle, that functionaries should appoint their own ministers. Again, if the office was created by 2 stat. 13 *Edw. c.* 6., it then appears to be an office for the hundred, and the same reasoning applies. In *Dalton's Court Justice*, c. 185. p. 511. (ed. 1715), it is said, "The sessions of the peace are a court of record holden before two or more justices of the peace, whereof one is of the *quorum*, for execution of the authority given them by commission of the peace, and certain statutes."

acts of Parliament." The quarter sessions are simply the general sessions holden quarterly. There is nothing in the nature of this court to give it a peculiar power of appointing the high constable.

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Wortley, contra. The question is, not whether justices in petty sessions might appoint, with the approbation of the general sessions, but whether their appointment against the will of the general sessions be good. If it be, a mandamus would lie to the general sessions to swear in a constable appointed at the petty sessions. The authority of the justices must arise either from statute, or from the devolution of a duty upon them, on the torn ceasing to act. It seems that, from a time earlier than the Conquest, the torn holden in the hundred was for the whole county, though holden in the several hundreds for the sake of convenience (a). In this point, it was distinguished from the hundred court, and was analogous to the general or quarter sessions. In *Dalton's Justice*, c. 28. p. 57., (ed. 1715), there is a reference to a dictum of *Fineux* C. J. of K. B., in *Yearb. Pasch.* 12 H. 7. pl. 1. fol. 17 B., 18 A., the effect of which is, that the counties were divided into hundreds, and high constables appointed for each hundred, because the counties were too populous to be undertaken by the sheriff, who originally had the government of them. This would explain why the sheriff's torn, though holden in the hundred, is still merely the sheriff's court for the whole county. So the leet was derived from the torn; and the petty constables, being the officers for the smaller divisions, were there elected. The authorities are collected in 3 *Hawk. P. C.*, p. 123. (7th ed.) book 2. c. 10.; in

(a) See *Lord Coke on Magna Charta*, stat. 9 H. 3. c. 35. 2 *Inst.* 70.

1839. *The Queen against WATKINSON.* 2 *Inst.* 71.; and in 4 *Inst.* 259, 267. Now it is clear that the torn, as a criminal court for the county, is at present represented, not by individual justices, but by the general sessions; and these cannot be distinguished from quarter sessions; *Lambard's Eirenarcha*, book 4. c. 19, pp. 592, 593., (ed. 1619). By stat. 12 R. 2. c. 10. the number of justices of the peace for a county is limited to six; by stat. 14 R. 2. c. 11. it is enlarged to eight. As there are eight wapentakes in the West Riding of Yorkshire; if, therefore, the election of high constables for the wapentake were confined to the justices of a single wapentake, the high constable in the West Riding would, even after stat. 14 R. 2. c. 11., have to be appointed by a single justice. But, in fact, petty sessions are of modern origin, and appear not to be recognised by the law, except where modern statutes give power to two or more justices. Then, to execute the powers, the requisite number of justices meet periodically. The court is therefore created only by these statutes, and the title has no other legal meaning. The holding of general sessions quarterly is prescribed by stat. 12 R. 2. c. 10., and 1 stat. 2 H. 5. c. 4. s. 2. *Lambard, Eirenarcha* book 4. c. 20. p. 623., says that the special sessions differ from the general chiefly in this, "that they holden at other times, when it shall please the justices themselves, or any two of them (the one being of the quorum) to appoint them. And this power they have, not only by the commission, but also by the statute 2 H. 5. c. 4." (1st statute) "which alloweth them to do it more often than the four times, if need do require. They be also (for the most part) summoned to some special business, and not directed to the general service of the commission: And yet there is no doubt but that all the articles within the commission of peace

peace, are both inquirable and determinable at any special sessions of the peace." And in book 4. c. 1. (p. 378.) he defines a session of the peace to be "an assembly of any two (or more) justices of the peace (one of them being of the quorum) at a certain day" &c. "appointed to enquire" &c., "and thereupon to proceed to hear and determine" &c.; and excludes such assemblies as are only for enquiry, which may be holden by justices, no one of whom is of the quorum. This shews that by "the sessions" the books mean a session of the whole body of justices; which is inconsistent with the notion that a limited number of justices, acting for a particular district, can, in the execution of their general authority, exclude the rest. What is now called a special petty sessions, might be held by justices who are not of the quorum, for certain purposes. That, therefore, is not, in the proper sense of the word, a session of the peace. [Coleridge J. When sessions meet for a special purpose, such as agreeing upon measures respecting the gaol, or the finances of the county, is not that by adjournment from a general sessions?] That is not always so. For instance, all the justices of the three Ridings of *Yorkshire* meet at *York* once in every year: that could not be by adjournment from any other sessions. The session which has the limited power is holden, according to *Lambard's* view, in the passage last referred to, under the first assignavimus, not the second, which requires one of the quorum. The legislature have adopted the principle of giving certain powers to two or more justices, relying on the advantage to be derived from their consulting each other; but such petty sessions can execute only such powers as the legislature expressly gives, or such as may be exercised by a single justice. It is true that *Lambard, Eirenarcha*, book 2.

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ch. 6. p. 186., says that, under the first assignavimus, one justice of peace may see that two constables be chosen in each hundred and franchise. He also says, *Duties of Constables, &c.*, p. 5. (ed. 1619), that the constables of hundreds were first created by the statute of *Winchester*, 2 stat. 13 Ed. 1. c. 6. Neither of these positions can be supported, as appears, indeed with respect to the latter, by the argument on the other side. It seems that the only way in which he supposes that a single justice can see to the appointment of a hundred constable was by presenting the sheriff if he does not hold the torn for the purpose, or the lord for not holding the leet; *Eirenarcha*, book 1. ch. 9. p. 46., *Dalt's Justice*, ch. 5. p. 20.

There is, further, no ancient recognition of a justice as acting for a single hundred or division. Stat. 33 H. 8. c. 10. s. 1. directs that, at the general session next after *Easter*, the justices shall divide themselves assigning two at least, into hundreds, wapentakes, &c. and the justices so divided shall hold a sessions six weeks at least before every quarter session. That statute however, repealed by stat. 37 H. 8. c. 7., which enacts that all the articles contained in the repealed statute shall be enquired of before all justices of peace at the ancient quarter sessions. In *Burn's Justice*, title *Poor* (vol. 4. p. 16. ed. *D'Oy. & W.*; vol. 4. p. 25. 28th (Chitty's) ed.), it is said, "In some of the ancient statutes, not now in force, as particularly the 22 H. 8. c. 12., the justices were required to *divide* themselves, for the better execution of the regulations concerning the poor. And thence came the clause in the subsequent statutes, that the justices *of the division* were to do such and such things. But as there is no law at present which requires them to *divide* for the aforesaid purposes,

poses, there is properly no *division*, in the sense which the statutes intended." In *Rex v. Price* (a) *Aston J.* said that, for the purpose of granting an ale licence, "any justice of the county, going to the meeting in the division," was "a justice of the division" within stat. 2 G. 2. c. 28. s. 11. In *Evans v. Stevens* (b) it was held that the word "division," in the act for better securing the freedom of elections, stat. 22 G. 3. c. 41. s. 1., meant something analogous to riding or county, and not one of the different parts of a county, &c., which is all comprehended in a single commission; and there Lord *Kenyon* said (c) that the divisions were "capriciously adopted in particular counties." Any one of such divisions was not necessarily confined to one hundred or wapentake, nor coextensive with it; nor are divisions made under stat. 9 G. 4. c. 43., for the better regulation of divisions in the several counties of *England and Wales*," so confined; and, therefore, the recent statute, 10 G. 4. c. 46. s. 1, was found necessary, to provide for the duty formerly executed by the high constable of the hundred, &c., under such circumstances. Stat. 37 G. 3. c. 143. s. 1. enables "the justices of the peace, at their respective petty sessions, within the divisions, districts, and other places of the several counties in *England and Wales*," to appoint examiners of weights and balances; and in *Rex v. The Justices of Devon* (d) it was held that this applied only to divisions existing at the time of the act passing; and Lord *Ellenborough* said, "What the legal qualities of a division may be, is perhaps doubtful." It is true that *Dalton*, *Just. c. 28. p. 56.*,

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(a) Note [a] to *Rex v. Stevens*, *Cald.* 305.

(b) 4 T. R. 224, 459.

(c) Page 462.

(d) 1 B. & Ald. 588.

says,

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says, "The usual manner is, that these high constables of hundreds be chosen either at the quarter sessions of the peace; or if out of the sessions, then by the greater number of the justices of peace of that division where they dwell: and likewise that they be sworn either at the sessions, or by warrant from the sessions; which course hath also been often allowed and commended to us by the judges of assize." What he means by "division" does not appear; but, as he says that the constables, if chosen out of sessions (meaning general sessions), should be sworn at the sessions, or by warrant from the sessions, it seems that at any rate he considered the real power to be in the justices of the county at large, though possibly he considered that the appointment out of sessions was good till the sessions had assented or dissented. A constable chosen at the leet may be sworn before a single justice; *Rex v. Franchard* (a): the necessity, therefore, of swearing a high constable, chosen for a hundred at the general sessions, must arise from the power of appointment being really in the general sessions, not from any incapacity in a single justice to receive the oath of office. The swearing, indeed, appears to constitute the appointment. In *Rex v. Whitchurch* (b) it was objected that a churchwarden signing a parish certificate had not been sworn in; the court, the certificate being nearly seventy years old, said that they would presume that the churchwarden had been sworn in; and *Littledale J.* said, "upon the question whether a churchwarden can lawfully do any act before he is actually sworn into office, I entertain some doubt. That matter was not fully dis-

(a) 2 Str. 1149.

(b) 7 B. & C. 573.

cussed in the case cited from *Ventris*" (a). In *Rex v. Hearle* (b) it was found, on the trial of a quo warranto for exercising the office of mayor, that the defendant was duly elected, and that he was not sworn; upon which judgment of ouster was given. And in *Rex v. Franchard* (c) the quo warranto was applied for on the ground that the defendant had not been sworn; and the reason for refusing the application was, not that swearing was unnecessary, but that in fact he had been sworn: and there the office was that of constable.

There are numerous authorities for the position, that the election of head-constable is by the justices at their general sessions: *Bacon, Law Tracts*, p. 183. (d); *Sheppard on the Offices of Constables, &c.*, ch. 7. s. 2. (e); 1 *Bla. Com.* 355., citing *Regina v. White* (g); *Regina v. Wyat* (h); *Charley Parish's Case* (i); *Com. Dig. Leet* (M 5.), citing *The Case of the Constable of Stepney* (k). There is also a MS. opinion given in 1811 by *Holroyd J.*, when at the bar, in which the same view is taken, and the above cases are cited. There is a precedent of an indictment for refusing to execute the office of high constable, in the *Crown Circuit Companion*, p. 165 (9th ed.), which is also referred to in *Wentworth's Pleading* (Index to vol. 6.; tit. vi.): there it is alleged that the defendant was elected at the general quarter sessions. The *Welsh Judicature Act*, 34 &

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(a) *Anonymous case*, 1 *Ventr.* 267.; cited in 4 *Vin. Abr.* 526. *Churchwardens*, (A. 2), pl. 9.

(b) 1 *Str.* 625.

(c) 2 *Str.* 1149.

(d) Tit. *Office of Constables*, ed. 1737.

(e) 4th ed. See also *Shepherd's Sure Guide, &c.*, ch. 1. s. 3., and ch. 20. pp. 13, 296. (2d ed.).

(g) 1 *Salk.* 150.

(h) 1 *Salk.* 175, 380.

(i) 3 *Salk.* 98.

(k) 1 *Bulst.* 174.

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35 H. 8. c. 26., which has been cited on the other side, and which, says *Barrington* (a), "contains a most complete code of regulations for the administration of justice, with such precision and accuracy, that no one clause of it hath ever yet occasioned a doubt, or required an explanation," affords a strong argument for the defendant. Sect. 53 appoints, for every shire, justices of peace and quorum, who, by sect. 55, are not to exceed eight in number, besides the president, council, and four *Welsh* judges: sect. 57 enacts "that the said justices of peace, or two of them at the least, whereof one to be of the quorum," shall hold sessions four times a year, and at other times upon urgent causes "as justices of peace in *England* use to do; and shall have like power and authority in all things," "and shall be bound to use and do their offices, in like manner as is used in *England*:" then sect. 70 gives the appointment of high constables to "the said justices of the peace, or two of them at the least, whereof one of them to be of the *quorum*." This, by reference to sect. 57, clearly refers to the general sessions. Stat. 13 & 14 C. 2. c. 12. s. 15. may be said to relate only to petty constables: but, supposing that to be so, the inference is that, *à fortiori*, the legislature considered the power to be in the general sessions in the case of high constables, who are officers of greater importance. Stat. 10 G. 4. c. xcvi. (local and personal, public), s. 1 gives the justices of *Cheshire*, at quarter sessions, the power of appointing special high constables for hundreds.

The high constables are the servants, not of the justices of the hundred only, but of all the justices; who, at

(a) *Observations on the Statutes*, 456. 3d edit.

the general sessions, must be attended by all the high constables (a). It would be highly inconvenient if a small number of the justices could make the appointment of such an officer against the will of the whole body.

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Further, it appears by the case that the defendant is duly elected unless *Edmondson* was previously elected; and that *Edmondson* has not been sworn in. Now, unless the office was full de jure and de facto, the election of the defendant was good. But the office cannot have become full de facto by *Edmondson* appearing and demanding to be sworn; *Rex v. Ponsonby* (b). In assize for the office of serjeant at mace to the House of Commons, it was held no proof of seisin that the party went to the House of Commons and demanded his place, but received no fees; *Cragg v. Norfolk* (c), cited in *Com. Dig. Seisin*, (D). So there must be an user, as well as a claim, of office, to support a quo warranto; *Rex v. Whitwell* (d). In *Tufton v. Nevinston* (e) a mandamus to swear in a party was granted, and issue was joined on the allegation that he had been elected. This shews that *Edmondson's* proper course would have been to apply for a mandamus directing the quarter sessions to swear him in: if his appointment at petty sessions gave him a right to the office, the Court would have granted the writ; *Rex v. Ellis* (g).

(a) See *Dalton's Just.* c. 185. p. 513.

(b) *Sayer's Rep.* 245, cited, *Bul. N. P.* 211.

(c) 2 *Lev.* 108.

(d) 5 *T. R.* 85. See *Regina v. Pepper*, 7 *A. & E.* 745.

(e) 2 *Ld. Raym.* 1354.

(g) Note (a) to *Rex v. Courtenay*, 9 *East*, 252. *S. C.* 2 *Str.* 994.

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Starkie, in reply. The last point is not raised by the case or the pleadings (a): nothing appears but that *Edmondson*, having an inchoate right by the election of the justices, demanded to be sworn in, and the sessions adjourned without either rejecting or granting his demand. In that state of things no election of another could be good.

The argument as to convenience is in favour of the Crown. If the justices may appoint in petty sessions delay will be saved. And the exercise of the office takes place within the hundred only. It is true that the appointment was formerly made at the torn; but then the torn was held, for convenience, in every hundred: *Horne's Mirror of Justices*, p. 108. ch. 1. s. 16. So, also, it would appear to be the most convenient arrangement that the justices should, in each hundred, make the appointment. The least convenient would be that there should be a canvass extending over the whole county.

As to the legal question. The relator contends, not that the justices could not elect at quarter sessions, but that the commission warrants the election by justices in the hundred, though not assembled in quarter sessions. The change, after the discontinuance of the sheriff's torn, appears to have consisted in a transfer of the power of appointment, not merely to the hundred, but to the justices of the peace; and, in some cases, the leets retain the right, in which they might be supposed to have a vested interest; 3 *Hawk. P. C.* 135. book 2. c. 10. s. 37. (b). According to *Lambard, Eirenarcha*, book 1. ch. 4.

(a) It is not thought necessary to refer to the pleadings more par-

p. 20., it was by 2 stat. 1 *Ed.* 3. c. 16. that the election of conservators or wardens of the peace was transferred from the people to the King. The commission follows, in some respects, the statute of *Winchester*, 2 stat. 13 *Ed.* 1. c. 6. Whatever may be done by the first assignavimus, that is, by justices not of the quorum, may be done at special sessions. The first assignavimus gives powers analogous in many respects to those of the ancient conservators of the peace: the second relates principally to judicial duties. It is clear that the justices do not appoint high constables under the second assignavimus. And it appears from *Lambard, Eirenarcha*, book 2. ch. 6. p. 186., that they do so under the first. It is said that the power with respect to constables is to be exercised by presentment at general sessions; but for this no reason can be given. [*Coleridge J.* Where is the high constable to be sworn? There may be no justice at the leet.] The course here pursued is that recommended in *Dalton's Just.*, ch. 28. p. 56. The high constable, after his election, demanded to be sworn at the quarter sessions; but the swearing was not necessary to his being high constable de facto; *Rex v. Corfe Myllen (a)*. The election may, it is true, be made by as many justices of the county as choose to meet: but it will not follow from this that the act must be done at quarter sessions. Any two justices may make a sessions; *Dalton's Just.* ch. 186. p. 511. All sessions not holden exclusively for a particular purpose may be called general sessions; 3 *Hawk. P.C.* 91. book 2. ch. 8. s. 18.; and *Lambard*, who appears to class under the head of special sessions all sessions holden at other than the ordinary times, still says, *Eirenarcha*, c. 20. p. 623., that at such special sessions

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all articles within the commission may be enquired of and determined. In *Dalton's Just.* ch. 28. p. 56., it is said "Every justice of peace may cause two constables to be chosen in each hundred," for which *Lambard*, 190 (a), is cited; and he adds, "and this seemeth to be meant of the high constables of hundreds, and to include and imply, of congruence, the swearing of them; and seemeth to be by virtue and force of the statute of *Winchester* made 13 Ed. 1. and of the commission, the first assignavimus or clause." The justices in the hundred act as justices of the whole county, just as a freeholder is a freeholder of the whole county, but exercises his rights in a particular place. Therefore, the authorities cited to shew that the justices of divisions have as such, no specific power, do not affect the relator's case. And this meets the difficulty suggested from the possibility of there not being enough justice in the particular division. Stat. 9 G. 4. c. 43. has no bearing on this question; the enactments regard merely arrangements to be made as to the divisions in which special sessions are to be held. The argument urged for the relator from stat. 34 & 35 H. 8. c. 26. has not been answered. Stat. 13 & 14 C. 2. c. 12. s. 15. shew that the general sessions were not called on to act, in the case of petty constables, except on disapproval of those appointed by the two justices. The authority of *Lord Bacon, Office of Constables (b)*, has been referred to. But on the question as to the practice of justices of peace his authority is of less weight than that of *Lambard* or *Dalton*; and his remarks, in ch. 19., on the origin of the office of high constable shew that he was imper-

(a) *Eirenarcha*, book 2. ch. 6. p. 186. ed. 1619.

(b) *Law Tracts*, p. 183. ed. 1737.

fectly informed: he does not mention 2 stat. 13 *Ed.* 1. c. 6. at all. The language of *Blackstone*, 1 *Com.* 355., is not borne out by the authority which he cites. The other authorities contain no more than dicta not essential to the decision of the cases in which they occurred. The precedent of an indictment, in which the constable is alleged to have been elected at the quarter sessions, does not shew that he could not be elected elsewhere: it might as well be argued that a high constable could be elected only at a court leet; for there are many precedents alleging such an election. In *Rex v. Hearle* (a) there was a specific issue on the swearing; and that was for the office of mayor, from which no argument can be drawn as to that of constable.

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Cur. adv. vult.

LORD DENMAN C.J., in this term (*May* 24th), delivered the judgment of the Court.

The defendant, having been in due form of law elected, admitted, and sworn at the General Quarter Sessions into the office of one of the chief constables of the wapentake of *Staincliffe*, in the *West Riding*, the question is, whether, at the time of his election, the office was not already full, a person of the name of *Edmondson* having been previously elected and appointed into the office, on the same vacancy, at a petty sessions of the justices of the peace usually acting for the same wapentake, holden for that declared purpose.

The right of appointing is admitted, on all hands, to be in the general body of the justices of the peace, since the non-user of the sheriff's torn. But it was

(a) 1 *Str.* 625.

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argued for the crown that the right may be exercised even by any single justice of the peace, and at all events by the regular meeting held at a petty session by those who usually act in that portion of the Riding.

The argument for the defendant was not directed against this doctrine, when applied to the right of dealing with offenders, and acting in the ordinary exercise of the jurisdiction of a justice of the peace; but a difference was taken between such proceedings and matters of election and appointment, which, being vested in the whole body, necessarily and of their own nature import that the whole body must have the opportunity of voting in the election of their office, that they must therefore be convened for that purpose.

Manifestly this cannot be done by the justices of the peace of a single wapentake agreeing among themselves to meet and make the election. No particular method of summoning is prescribed by law; but any method which secures full notice, and allows all to exercise their judgment, will suffice. Now this may well be done, and we are of opinion that it has been done in favour of this defendant, at the general sessions, and that it was not well done at the petty sessions for the wapentake.

It follows that the election of the defendant was good; and that he is entitled to our judgment.

Judgment for the defendant.

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ASSUMPSIT. The first count of the declaration stated that heretofore, to wit on &c., "in consideration that the said plaintiffs, at the special instance and request of the said defendant, would give up to him a certain guarantee of 10,000*l.* on behalf of Messrs. *John Lees* and Son, *Manchester*, then held by the said plaintiffs, he the said defendant undertook, and then faithfully promised the said plaintiffs, to see certain bills, accepted by the said Messrs. *John Lees* and Sons, paid at maturity; that is to say, a certain bill of exchange" bearing date &c., drawn by plaintiffs upon and accepted by the said *Lees* and Sons, payable three months after date, for 3466*l.* 13*s.* 7*d.*, and made payable at &c.: and also a certain other bill, &c.: describing two other bills for 3000*l.* and 3200*l.* drawn by plaintiffs upon and

Declaration in assumpsit, stating that defendant promised, in consideration that plaintiffs, at his request, would give up to him a certain guarantee of 10,000*l.* on behalf of *L.*, then held by plaintiffs. Averment, that plaintiffs gave up the guarantee, but defendant did not perform his promise. Plea, that the guarantee was a promise to answer for the debt of another, and that there was no agree-

ment, &c., in writing, wherein any sufficient consideration was stated (according to stat. 29 Car. 2. c. 3. s. 4.). And that the supposed guarantee was contained in the following written memorandum signed by defendant: — "Messrs. *H.*" (the plaintiffs). "In consideration of your being in advance to *L.* in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf. *J. B.*"

Held, by the Court of Queen's Bench, on demurrer, that the words of the guarantee did not necessarily imply a past advance; and that, if they left it even doubtful whether a future advance was not guaranteed, a promise made in consideration of giving it up was valid. But,

Held, further, that at all events it appeared on the pleadings that the plaintiffs had delivered something to the defendant, on the faith of his promise, which he at the time considered valuable, and this being so, and no fraud imputed, he could not afterwards excuse a breach of the promise, by alleging that the thing given up was not of the value he had supposed.

Judgment affirmed on error, by the Court of Exchequer Chamber.

Held, by the Court of Error, that the guarantee did not necessarily imply a past advance; and that the plaintiffs, on a trial, might have offered evidence to shew that future advances had been contemplated.

Held also, *Maule* B. dubitante, that the paper on which the guarantee was written appeared by the declaration and plea to have been given up by plaintiffs to defendant; and that this alone was consideration for a promise.

Held, by the Court of Queen's Bench, that, on the trial of an issue of fact raising the question whether or not the above guarantee had been delivered up, the guarantee might be given in evidence, though unstamped.

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accepted by *Lees* and Sons, and made payable at &c. Averment, that plaintiffs, relying on defendant's said promise, did then, to wit on &c., "give up to the said defendant the said guarantee of 10,000*l*." Breach, non payment of the bills, when they afterwards came to maturity, by *Lees* and Sons, or the parties at whose house the bills respectively were made payable, or by defendant, or any other person, &c.

Third plea, to the first count: "That the said supposed guarantee of 10,000*l*., in consideration of the giving up whereof the defendant made such supposed promise and undertaking as therein mentioned, and which guarantee was so given up to the said defendant as therein mentioned, was a special promise answer the said plaintiffs for the debt and default of other persons, to wit the said Messrs. *John Lees and Sons* in the said first count mentioned; and that agreement in respect of, or relating to, the said supposed guarantee or special promise, or any memorandum note thereof, wherein any sufficient consideration for the said guarantee or special promise was stated or shown was in writing and signed by the said defendant, or any other person by him thereunto lawfully authorized. And the said defendant further saith that the said supposed guarantee, in consideration of the giving up whereof the defendant made the said supposed promise and undertaking in the said first count mentioned, and which was so given up as therein mentioned, was and is contained in a certain memorandum in writing signed by the defendant, and which was and is in the words and figures and to the effect following, that is to say: — '*Manchester*, 4th February, 1837. Messrs. *Haigh and Franceys*. Gent. In consideration of your being

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in advance to Messrs. *John Lees* and Sons, in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount (say 10,000*l.*), on their behalf. *John Brooks.*' — And that there was no other agreement or memorandum or note thereof, in respect of, or relating to, the said last-mentioned supposed guarantee or special promise: wherefore the said defendant says that the supposed guarantee, in consideration whereof the said defendant made the said supposed promise and undertaking in the said first count mentioned, was and is void and of no effect; and therefore that the said supposed promise and undertaking in the said first count mentioned was and is void and of no effect." Verification.

Demurrer, assigning for cause, "that it is admitted by the plea that the memorandum, the giving up of which was the consideration of the guarantee in the said declaration mentioned, was actually given up to the said defendant by the said plaintiffs, and the consideration was therefore executed by the said defendant, and that, even if the original memorandum was not binding in point of law, the giving up was a sufficient consideration for the promise in the declaration mentioned." Joinder.

The demurrer was argued in last *Hilary* term (a).

Sir *W. W. Follett* for the plaintiff. The undertaking declared upon is, on the face of it, sufficient to satisfy the Statute of Frauds, 29 *Car. 2. c. 3. s. 4.* It is said, however, that the consideration is really insufficient, because the guarantee delivered up was one which could

(a) *January 18th.* Before Lord *Denman C. J., Littledale, Williams, and Coleridge Js.*

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not have been sued upon consistently with the statute. ~~But~~.
But, assuming that to be so, a promise in consideration ~~of~~ ~~of~~
of delivering up such a guarantee might still be good. ~~But~~.
The defendant might, for substantial reasons, wish to ~~to~~ to
have the guarantee back. His mercantile character was ~~was~~ ~~as~~
pledged by it. It might, on various other accounts, be ~~be~~ ~~de~~
important to him that such a paper should not remain ~~in~~ ~~in~~
in the plaintiff's hands; and, if the bargain was made ~~be~~ ~~de~~
upon any consideration, the Court will not inquire into ~~to~~ ~~to~~
its adequacy. This principle was lately recognised in ~~in~~ ~~in~~
Hitchcock v. Coker. (a) Such a promise might be made ~~be~~ ~~be~~
in consideration of delivering up a letter; no one but ~~but~~ ~~at~~
the defendant might be able to judge how far the pos- ~~pos~~ ~~pos~~
session of it was valuable; but, if the letter was given ~~up~~ ~~up~~
at his request, the rule would apply; that any thing ~~so~~ ~~so~~
given, to the plaintiff's detriment, or the benefit of ~~the~~ ~~the~~
defendant, is consideration for an assumpsit. Suppose ~~the~~ ~~the~~
undertaking given up had been one rendered unavailing ~~ing~~ ~~ing~~
by the Statute of Limitations, no action would have ~~have~~ ~~have~~
lain upon it, but the attempt to enforce it could ~~not~~ ~~not~~
perhaps have been resisted without injury to the ~~de~~ ~~de~~
defendant's mercantile character; the relinquishment ~~of~~ ~~of~~
it, therefore, would have been good consideration for ~~a~~ ~~a~~
promise. The present is a similar case. Release from ~~a~~ ~~a~~
moral obligation is consideration enough for an ~~exp~~ ~~ess~~
promise. If it were necessary that something should ~~ld~~ ~~ld~~
be foregone to which there was a legal right, the ~~de~~ ~~de~~
delivery of the mere written paper, which contained ~~the~~ ~~the~~
first guarantee, was sufficient in this case. The pla- ~~n~~ ~~n~~
tiffs are entitled to put some value on the possession ~~of~~ ~~of~~
such a paper, though not legally available; as ~~the~~ ~~the~~
might on the possession of a cancelled bond, or bill ~~s~~ ~~s~~

(a) 6 A. & E. 438. And see *Archer v. Marsh*, 6 A. & E. 959.

accepted by the defendant on wrong stamps. It is not, indeed, clear in this case that the first guarantee was void. In *Boehm v. Campbell* (a) a similar guarantee was held to shew a sufficient consideration, though the advance for which the security was given had been already made, and it did not appear more distinctly than in the present case that time was to be granted. Supposing it even questionable whether the former undertaking bound the defendant, yet the discharge from a claim, or waiver of a defence, on which the promisee might or might not have been legally entitled to succeed, is consideration enough to support an assumpsit; *Longridge v. Dorville* (b), *Stracy v. The Bank of England* (c). Here, however, it appears, at all events, that the original guarantee may have been given under circumstances which rendered it morally binding; and that brings it within the principle of *Lee v. Muggerridge* (d) and other cases in which promises supported by moral obligation have been held sufficient.

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Sir J. Campbell, Attorney General, contra. First, the original guarantee was void; and, if so, then, secondly, the promise declared upon is without consideration. First, the guarantee of February 4. 1837, expresses only the past consideration of the plaintiffs "being in advance." The cases cited in note (1) to *Osborne v. Rogers* (e) shew that this is not sufficient ground for an assumpsit, no request being alleged. A valid consideration was essential to a promise at common law; and, when the Statute of Frauds required that the agree-

(a) 3 B. Moore, 15. S. C. 8. Taunt. 679.

(b) 5 B. & Ald. 117.

(c) 6 Bing. 754.

(d) 5 Taunt. 36.

(e) 1 Wms. Saund. 264.

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ment, in certain cases, should be written, it thereby became necessary, not only that a proper consideration should exist, but that the writing should distinctly shew it: *Wain v. Warlters* (a), *Saunders v. Wakefield* (b), *Jenkins v. Reynolds* (c), *Cole v. Dyer* (d), *Wood v. Benson* (e), *James v. Williams* (g). A consideration cannot be intended; it must be actually expressed, or necessarily to be implied; *Hawes v. Armstrong* (h), *Raikes v. Todd* (i). Secondly, the guarantee being void, the undertaking substituted for it, without any new consideration, is void also. The case is no better than if a second guarantee had been given in the words of the first. A consideration, to support a promise, must have some value in point of law; *Smith and Smith's Case* (k), and other authorities cited in note [b] to *Barber v. Fox* (l). *Rann v. Hughes* (m) illustrates the same point. A man may have in his possession a letter of which improper use might be made; but his delivering it up is no legal consideration. An unfounded action may create annoyance; but the renouncing it is no consideration in law for a promise. Where, indeed, there is a reasonable doubt, in point of law, whether the promisee would or would not succeed if the litigation were prosecuted, case is different: that was so in *Longridge v. Dorville* (n) and *Stracy v. The Bank of England* (o). In *Shortrede v. Cheek* (p) the consideration disclosed was,

(a) 5 East, 10.

(b) 4 B. & Ald. 595.

(c) 3 Brod. & B. 14.

(d) 1 Cro. & J. 461. S. C. 1 Tyrwh. 304.

(e) 2 Cro. & J. 94. S. C. 2 Tyrwh. 93. (g) 5 B. & Ald. 1109.

(h) 1 New Ca. 761.

(i) 8 A. & E. 846.

(k) 3 Leon. 88.

(l) 2 Wms. Saund. 137 e. 5th ed. See *Jones v. Waite*, 5 New Ca. 341.(m) Note (a) to *Mitchinson v. Hewson*, 7 T. R. 350.

(n) 5 B. & Ald. 117.

(o) 6 Bing. 754.

(p) 1 A. & E. 57. See *Wilkinson v. Byers*, 1 A. & E. 106.

that

that the plaintiff should withdraw a promissory note, on which he had an unquestioned right of action: and *Parke J.* said, "There is no doubt that the giving up of any note upon which the plaintiff might have sued, would be a sufficient consideration." It is argued that foregoing a security upon which the Statute of Limitations had attached would be a consideration; but there an action would lie on the security if the statute were not pleaded. Whether the giving up a bill drawn on a wrong stamp would be a consideration or not may be questionable; but the objection is not one of which the Court would take judicial notice: here the Court must take notice that the guarantee is invalid. It is contended here that the promise is binding, because grounded on a moral obligation; but that obligation rests on a promise which is itself not binding; the new engagement, then, cannot have more force than the original one. In the cases where a moral obligation has been held sufficient ground for an express promise, the obligation has been something more than a nudum pactum: thus, in *Lee v. Muggeridge* (a) money had been advanced by the plaintiff at the request of the promisor. But the doctrine, that a moral obligation is sufficient consideration for a subsequent promise, is not free from doubt. Lord *Tenterden* said, in *Littlefield v. Shee* (b), that it must be "received with some limitation." The instances which have been considered as establishing that doctrine are brought together in note (a) to *Wennall v. Adney* (c), and seem to resolve themselves into these classes. First, where there has been a legal obligation antecedent to the promise; as the duty of overseers to provide for the

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(a) 5 Taunt. 36.

(b) 2 B. & Ad. 811.

(c) 3 Bos. & P. 249.

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poor. Secondly, where there was an antecedent equitable liability, as that of an executor to pay legacies; but the doctrine, as applicable to these cases, appears to have been overruled. Thirdly, where a debt existed before the promise, but the remedy was barred by statute; as in the cases of certificated bankrupts or discharged insolvents; or where the Statute of Limitations has attached: in these instances the party indebted may waive the statutory bar and obligate himself, by a promise, to pay the debt. Fourthly, where a promise merely voidable has been ratified; as in the case of a person of full age promising to pay a debt contracted during his infancy (a). In all these cases, so far as the doctrine is established, there has been an actual benefit received, or a debt, or other ground of legal obligation, antecedent to the promise relied upon: not merely a nudum pactum, as in the present instance, where the party originally promising had received no benefit, nor had the plaintiffs incurred any loss or prejudice at his request. The money had been advanced when the guarantee was given; then the defendant said, "Forego the guarantee, and I will see you paid." The prior moral obligation was only that which every man is under to keep his word. *Nash v. Brown* (b), *Holday v. Atkinson* (c), and *Bret v. J. S. and his Wife* (cited in note [b] to *Barber v. Fox* (e)), all shew the moral considerations, where no actual benefit has been received by one party, or prejudice sustained by the other, and no legal duty has attached, are not sufficient

(a) See *Meyer v. Haworth*, 8 A. & E. 467.

(b) *Chitty on Bills*, 74. note x. 9th ed. (1840) by *Chitty and Hulme*.

(c) 5 B. & C. 501.

(d) *Cro. El.* 755.

(e) 2 *Wms. Saund.* 137 c. 5th ed.

ground

ground for an assumpsit. As to the delivery, in this case, of the mere paper, it is not pretended that the paper had any value: the contract of guarantee, not the paper containing it, was the object really in question.

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Sir *W. W. Follett* in reply. It may be collected from the guarantee in this case, as it was from that in *Boehm v. Campbell* (a), that the consideration for giving it was forbearance; and, if that appears with certainty, though not expressed in direct terms, the guarantee was sufficient. *Boehm v. Campbell* (a) is not over-ruled by *Raikes v. Todd* (b). This Court, in the latter case, could not see clearly that the consideration stated in the guarantee was that alleged in the declaration: but two of the learned judges were inclined to think, with *Alderson B.* who tried the cause, that "I hereby undertake to secure to you the payment of any sums of money you have advanced" to *H. D.* implied a future forbearance by the plaintiffs. So far, that case is favourable to the present plaintiffs: and the words relied upon by them, "I do hereby give you my guarantee for that amount," are stronger than those used in *Raikes v. Todd* (b). And, if it was only doubtful whether such a guarantee was not available, the giving it up was a good consideration. If the invalidity of it was not a point as clear as that the eldest son inherits, the Court will not measure the degree of doubt. It has scarcely been disputed that the giving up of bills drawn on wrong stamps, or a contract on which the Statute of Limitations had attached, would be sufficient consideration: but those cases do not essentially differ from the present. The

(a) 3 B. Moore, 15. S. C. 3 Taunt. 679.

(b) 8 A. & E. 846.

bills

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bills are void from the first, and cannot be made valid; though the promisor may have good reason for wishing to get them into his possession. It is suggested that the bar created by the Statute of Limitations may be waived; but so also may that under the Statute of Frauds. It is clear that, to support a promise of this kind, there need not have been an original liability in the promisor; for that is not so in the case of the bills, or in that of the contract made during infancy. That a promise may be founded on sufficient consideration, though no benefit has accrued to the promisor, appears from *Stevens v. Lynch* (a), where the drawer of a bill, knowing that time had been given to the acceptor, undertook to pay on the acceptor's default, and an action was held maintainable on that undertaking. But, supposing the guarantee in this case to have been totally void, the giving up of a paper on which no action would lie may be sufficient consideration for a promise. Here the plaintiffs, though not entitled to recover on the guarantee, might have brought trover for the document if unlawfully taken out of their hands. In considering whether or not such an action would lie, the value would be of no importance; it is enough for the present argument, if the plaintiffs could have recovered a shilling. Suppose the defendant had said, "If you will not bring trover, I will pay the bills;" an action would clearly have lain on such an agreement, and the case would not have differed from the present. The consideration here is, not the releasing of an action on the guarantee, but the giving it up; whatever its value may have been, the bargain is binding. [*Coleridge J.* It is decided in *Scott v.*

(a) 12 East, 38.

Jones (a) that trover lies for an unstamped document *if* it is capable of being made good by stamping.] Any paper may be the subject of an action of trover.

Cur. adv. vult.

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Lord DENMAN C. J., in this term (June 6th), delivered the judgment of the Court.

This action was brought upon an assumpsit to see certain acceptances paid, in consideration of the plaintiffs giving up a guarantee of 10,000*l.* due from the acceptor to the plaintiffs. Plea, that the guarantee was for the debt of another, and that there was no writing wherein the consideration appeared, signed by the defendant, and so the giving it up was no good consideration for the promise. Demurrer, stating for cause that the plea is bad, because the consideration was executed, whether the guarantee were binding in law or not. The form of the guarantee was set out in the plea. "In consideration of your being in advance to Messrs. *John Lees* and Sons, in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount (say 10,000*l.*), on their behalf. *John Brooks.*"

It was argued for the defendant that this guarantee is of no force, because the fact of the plaintiffs being already in advance to *Lees* could form no consideration for the defendant's promise to guarantee to the plaintiffs the payment of *Lees*'s acceptances. In the first place, this is by no means clear. That "being in advance" must necessarily mean to assert that he was in advance at the time of giving the guarantee, is an assertion open to argument. It may possibly have been intended

(a) 4 *Taunt.* 865.

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as prospective. If the phrase had been "in consideration of your *becoming* in advance," or "*on condition* of your being in advance," such would have been the clear import (a). As it is, nobody can doubt that the defendant took a great interest in the affairs of Messrs. *Lees*, or believe that the plaintiffs had not come under the advance mentioned at the defendant's request. Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guarantee; and, if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it.

But we are by no means prepared to say that any circumstances short of the imputation of fraud in fact could entitle us to hold that a party was not bound by a promise made upon *any consideration* which could be valuable; while of its being so the promise by which it was obtained from the holder of it must always afford some proof.

Here, whether or not the guarantee could have been available within the doctrine of *Wain v. Warlters* (b), the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge.

(a) See the discussion on the words "for giving his vote," in *Lord Huntingtower v. Gardiner*, 1 B. & C. 297.

(b) 5 East, 10.

We therefore think the plea bad: and the demurrer must prevail.

Judgment for the plaintiffs.

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There was also, in this case, an issue of fact, raising the question whether or not the plaintiffs had given up the original guarantee. On this issue the parties went to trial at the *Liverpool* Spring assizes, 1839, before *Alderson* B. The plaintiffs called on the defendant to produce the guarantee. On production it appeared to be unstamped, and *Cresswell*, for the defendant, therefore objected to its being read. *Alderson* B. admitted it; and the plaintiffs had a verdict. *Cresswell* moved for a new trial in the ensuing term, on account of the admission of that evidence; and he cited *Jardine v. Paine* (a). *Patteson* J. mentioned *Coppock v. Bower* (b) and *Walliss v. Broadbent* (c). The rule was afterwards made absolute by consent. The cause was tried again at the *Liverpool* Spring assizes, 1840, before *Erskine* J. The guarantee was not produced, having been destroyed since the last trial; but the learned Judge (assuming it not to have been stamped) allowed evidence to be given of its contents; and, on this ground, *Cresswell*, in the ensuing *Easter* term, moved for a new trial (d). He referred to *Crisp v. Anderson* (e) and *Gillett v. Abbott* (g).

Cur. adv. vult.

Lord DENMAN C. J. in the same term (*April* 27th, 1840) delivered the judgment of the Court. This was an action on an agreement made in consideration of

(a) 1 B. & Ad. 663.

(b) 4 M. & W. 361.

(c) 4 A. & E. 877.

(d) *April* 16th. Before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

(e) 1 Stark. N. P. C. 35.

(g) 7 A. & E. 783.

giving

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giving up a former guarantee. Plea, that the guarantee was not, in fact, given up. On a former trial, before *Alderson B.*, the paper in question was produced, without a stamp. The learned Judge received the evidence; and we thought the case sufficiently doubtful to grant a rule for a new trial. The plaintiff submitted to its being made absolute; and a second trial took place before my Brother *Erskine* at the last assizes. In deference to the former decision, which had not been overruled but was only in a course of investigation, and, as we understand, with some intimation that he thought the evidence admissible, he received evidence that the paper (at the time of the trial destroyed) had been given up in an unstamped state, which raised precisely the same point. A motion for a new trial, on this ground, has now been made: but upon more consideration we agree in opinion with the two learned Judges, and think that the paper, for the purpose for which it was produced, required no stamp.

The authority mainly relied on for the opposite doctrine is *Jardine v. Paine* (a): but the unstamped paper there was the very bill of exchange in respect of which the action was brought, and through which the plaintiff must have made out his title to recover. There was an attempt to resort to the unstamped paper to shew the amount due, which would have been successful if the acknowledgment referring to it had been made to the plaintiff: but it was made to the holder of the bill; and direct proof of the bill was therefore necessary. The principle of that decision may be taken from Lord *Tenterden's* words in giving judgment; it cannot be proved unstamped, as a security. Now the paper here

(a) 1 B. & Ad. 663.

called

called a guarantee was not wanted as a security, but as a description of the consideration for the defendant's promise. An inadequate security might, from various motives, be a very good consideration; and this document, if produced, might have been read to the jury to shew that it answered the description in the declaration of a guarantee, though it was not a *binding* guarantee for want of a stamp. If the defendant had simply pleaded that the guarantee was without a stamp, such plea would have been held bad on demurrer.

Rule refused.

The plaintiffs having signed judgment, error was brought in the Exchequer Chamber, and the judgment below was affirmed. The arguments, and judgment of the Court of Error, may conveniently be inserted here.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

BROOKS *against* HAIGH and Another.

Monday,
June 29th,
1840.

THE writ of error set out the pleadings, of which the material part is stated in the preceding report. The errors assigned were, that the declaration is insufficient, and that the judgment was for the plaintiffs below, whereas it ought to have been for the defendant. The writ of error was argued in *Trinity* vacation (June 22d) 1840, before Lord Abinger C. B., Bosanquet, Coltman, and Maule Js., and Alderson and Rolfe Bs.

Sir J. Campbell, Attorney General, for the plaintiff in error, the defendant below, contended, on the authorities

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before cited, that the original guarantee was void, being on a consideration executed, and not alleged to have been executed at the defendant's request. [*Alderson B.* Is not it ambiguous whether the words, "in consideration of your being in advance," refer to the being already in advance, or being so in future?] The language is unambiguous, and will not bear a prospective construction. *Boehm v. Campbell (a)* was decided while a doubt still prevailed as to the doctrine of *Wain v. Warlters (b)*; but in *Boehm v. Campbell (a)* the Court of Common Pleas thought that the consideration of forbearance sufficiently appeared by the written agreement. Here it is neither stated in the guarantee, nor necessarily to be collected from it; *Raikes v. Todd (c)*, therefore, is an authority for the defendant below. Then no action would have lain on this guarantee; and, if so, is the giving it up sufficient consideration for a new promise? Such an act is no consideration unless the thing given up be of some merchantable value. Thus in *Com. Dig., Action upon the Case upon Assumpsit*, (F 8.), (cited by *Holroyd J.* in *Longridge v. Dorville (d)*) it is said that the action does not lie upon a promise "in consideration of a surrender of a lease at will; for the lessor might determine it." There is, indeed, a qualification added; "unless there was a doubt, whether it was a lease at will, or for years:" but even then, unless the doubt were a very reasonable and well-grounded one, the action would fail. In *Smith and Smith's Case (e)* the alleged consideration for an assumpsit was, that the promisee "would commit the education of his children,

(a) 3 B. Moore, 15. S. C. 8 Taunt. 679.

(b) 5 East, 10.

(c) 8 A. & E. 846.

(d) 5 B. & Ald. 123.

(e) 3 Leon. 88.

and

and the disposition of his goods after his death during the minority of his said children, for the education of the said children" to the defendant; and this was held not sufficient, the consideration being only to have the disposition of the goods for the benefit of the children, and not for the defendant's profit. There must be some advantage to the promisor, or detriment incurred by the promisee at his request. [*Maule J.* It need not be pecuniary. Lord *Abinger C. B.* In *Smith and Smith's Case* (a) the suggestion in support of the consideration was that the defendant was to reap a pecuniary advantage, which the Court would not presume, because his doing so would have been a breach of trust.] The advantage must be such as can be appreciated in a court of law. There are many cases in which promises in consideration of forbearance to sue have been held void, where there was no suit that could have been forborne: *Tooley v. Windham* (b), *Barber v. Fox* (c), *Loyd v. Lee* (d). It is true that the giving up a doubtful point of law has been held a good consideration, as in *Longridge v. Dorville* (e); and it may be so where a reasonable doubt exists; but in this case there could be no doubt on the invalidity of the first guarantee. [*Alderson B.* What is the ground on which the giving up a doubtful point of law is a consideration? To whom must it be doubtful? The Court which decides upon the assumpsit must be supposed capable of deciding the point of law.] There is a degree of uncertainty which the courts will notice. [*Maule J.* referred to *Jones v. Randall* (g).] In *Stracy v. The Bank of England* (h) the point which might have

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(a) 3 Leon. 88.

(c) 2 Saund. 136.

(e) 5 B. & Ald. 117.

(h) 6 Bing. 754.

(b) Cro. Eliz. 206.

(d) 1 Stra. 94.

(g) 1 Cowp. 37.

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been litigated was one of great nicety and difficulty. *Tindal* C. J., in his judgment, so describes it. The argument on moral obligation can apply only to the first guarantee; the terms of the declaration do not admit of its being extended to the second. And on the first guarantee no consideration appears, except the general obligation to perform a promise.

The Court below, in their judgment, argue that the words "in consideration of your being in advance" might mean "on condition of your being in advance;" and suggest, as rendering this probable, that the plaintiffs must have come under the advance at the defendant's request; a supposition not confirmed by any thing which appears on the record: and they ground upon it the observation, "Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guarantee; and, if that be so, we have no concern with the adequacy or inadequacy of the price." They also say; "Whether or not the guarantee could have been available within the doctrine of *Wain v. Warlters* (a), the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise." [*Maule* J. The record does not shew that any document was in the plaintiff's possession. "Giving up" the guarantee might be merely relinquishing the contract. *Alderson* B. If they held a written guarantee, it might have been given up by cancelling merely.] The Court below argue that the defendant cannot be justified in breaking his promise by discovering that the thing in consideration of which he gave it did not possess that value which he sup-

(a) 5 East, 10.

posed to belong to it.* "It cannot be ascertained," they say, "that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge." But this reasoning would support a promise even in such a case as *Barber v. Fox (a)*. [The plaintiffs contend that trover would have lain for the paper; but it may be inferred, even from *Scott v. Jones (b)*, that this would not be so unless the paper had some real value.

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Sir *W. W. Follett*, contra. As to the observation that no actual delivery of a written paper appears, if that were considered important, the plaintiffs would ask leave to amend. The point was not taken on the former argument; and, when the declaration speaks of giving up a guarantee, which it describes as "*then held*" by the plaintiffs, it cannot reasonably be supposed that nothing is meant but foregoing an engagement. Supposing that no action would have lain on the first guarantee, here is an agreement between persons competent to make contracts, without imputation of fraud on either side, by which one is to give up an undertaking signed by the other, and the other, in consideration of it, is to provide for certain bills. It is assumed, without reason, that the defendant's only object in desiring to have the guarantee back must have been to prevent an action. He might not choose that his name should remain abroad in the mercantile world, annexed to such a document. It implies an admission which he might think proper to recall. He might not wish, if sued, to be put to a defence on the Statute of Frauds. If he

(a) 2 *Saund.* 136.(b) 4 *Taunt.* 865.

[CASE IN TRINITY VACATION

reached a value to the document* from any cause, however inadequate, as a man might be willing to give an immoderate price for a picture or autograph, the Court will not inquire into the goodness of the bargain. Giving up any thing of which they were possessed was a disadvantage to the plaintiffs; and the defendant here was benefited by it. The case, therefore, differs from that of a mere forbearance to sue, where nothing is given and received. The law of *Smith and Smith's Case* (a) may be doubted. If the promisee there complied with terms by which the defendant obtained something from him, although those terms could not authorise the making of any illegal profit, it would seem that the defendant was bound.

But an action here might have been maintained on the first guarantee. The doctrine of *Wain v. Warlters* (b) cannot now be disputed, though the decision may be regretted as going beyond the object contemplated by the Statute of Frauds. But the consideration, though it must be stated, need not be set forth with all the accuracy of special pleading; *Raikes v. Todd* (c) shews this. And, unless the written agreement is so expressed that it must necessarily have been a nudum pactum, those relying upon it may shew, by the situation of the parties and by other extrinsic circumstances adduced in evidence, that a valid consideration was contemplated. "In consideration of your being in advance," may refer to future advances; and the plaintiffs might shew that it did so, by evidence that at the time of making the promise there had been no advance. Even if the advance were a past one, the language, which is that of the party

* R.R.

(b) 5 East, 10.

(c) 8 A. & E. 846.

promising.

promising, will be taken most strongly against himself, and may be presumed to mean that the advance was at his request. It is clear, from several cases, that the courts, in estimating the consideration of a written agreement, will look at the extrinsic circumstances. This was so, to a certain extent, in *Morris v. Stacey* (a); Tindal C. J. refers to such circumstances in *Stracy v. The Bank of England* (b); so also does Richardson J. in *Boehm v. Campbell* (c). In *Newbury v. Armstrong* (d) Tindal C. J. took into consideration the probable state of facts, as he inferred it from the terms of the guarantee; and that inference might clearly have been supported or varied by other proof. In *Shortrede v. Cheek* (e) the guarantee required, as consideration for the defendant's promise, that the plaintiff should withdraw "the promissory note;" and this was alleged in the declaration to have been a note given to the plaintiff by one Henry Cheek, which note was proved to have been so given. It was urged that the statement of consideration on the guarantee was uncertain, because it did not refer to this note in particular: but the Court held otherwise; and Littledale and Parke Js. observed that, on the evidence, only one note had appeared to be in question. So, here, it might be shewn by evidence that there was no advance in question, prior to the guarantee. *Raikes v. Todd* (g) is, in principle, an authority for the plaintiff in error. The declaration there stated, as a consideration for the alleged promise, future advances, and not a forbearance in respect of advances past; had the count been properly framed, it might

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(a) *Holt*, N. P. C. 153.

(c) 3 B. Moore, 15.

(e) 1 A. & E. 57.

(b) 6 Bing. 754.

(d) 6 Bing. 201.

(g) 8 A. & E. 846.

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have been shewn by evidence; that the guarantee had, in fact, reference to both. The guarantee itself was not impeached. The Court of Exchequer acceded to the doctrine of that case in *Kennaway v. Treleavan* (a) (where they held that the consideration was sufficiently disclosed); and *Newbury v. Armstrong* (b) was there relied upon as an authority.

Supposing, however, that an action would not have lain on the first guarantee, yet, if the law upon the subject was doubtful (though *Boehm v. Campbell* (c) makes it clear on the side of the plaintiffs), and the parties, upon that doubt, entered into a bargain for the abandonment of the guarantee, such bargain, made with a knowledge of all the facts, is binding; *Longridge v. Dorville* (d), *Stracy v. The Bank of England* (e), *Com. Dig., Action upon the Case upon Assumpsit*, (F 8.), referring to 1 Roll. Abr. 23, *Action sur Case*, (V), pl. 27, 28. (g). It is indeed asked, who is supposed to entertain the doubt in point of law? But matters of law may be considered as doubtful to the courts; and arrangements in equity are often made on the ground of the law being doubtful. [Bosanquet J. A point may be considered so, on which learned men differ. Lord Abinger C. B. It is carrying fiction too far to say that the courts must always know how the law will be.] The parties here have made their contract on a consideration which they, knowing all the facts, thought beneficial; and this is enough. Merchantable or pecuniary value, in any more limited sense, is not to be insisted upon. The

(a) 5 M. & W. 498.

(b) 6 Bing. 201.

(c) 3 B. Moore, 15. S. C. 8 Tuunt. 679.

(d) 5 B. & Ald. 117.

(e) 6 Bing. 754.

(g) Comyns refers to *Kent v. Prat*, *Brownl. & Gold*, 6., the case cited by Rolle. But it does not appear that any doubtful point of law was there contemplated.

Case falls within the principle of *Stevens v. Lynch* (a), and also within that of *Lee v. Muggeridge* (b) and other decisions which have turned upon moral obligation. It results from all these authorities that, if parties, having made an engagement which ought to bind them but is incapable of being enforced, replace it by another, that new engagement is valid in law. If the contrary doctrine could prevail, what limit would there be to objections? Would a second or third renewal of guarantees be void on account of the original defect?

Lastly, as was contended below, if the consideration amounts to no more than the delivering up of a paper at the defendant's request, the Court cannot say that it is insufficient. If they do, at what point will they allow sufficiency of consideration to begin? Would the giving up an autograph, or a horse or dog of no merchantable value, be sufficient? [Lord Abinger C. B. The Attorney General cited the case of a lease at will.] That relates to a surrender, not the giving up of a document. Papers, though ineffectual for the purpose contemplated in drawing them up, may have a value from the mere wish of a party to get them into his own hands. [Rolfe B. The Lord Chancellor has said that he will never compel the giving up of an instrument which is void on the face of it.] An application in equity for that purpose is very different from the enforcing of a bargain to give up something which is considered valuable. [Bosanquet J. Is not the document property, however small the value?] Yes; and trover would lie for it. In *Wilkinson v. Oliveira* (c) it was held sufficient consideration, for a promise to pay 1000*l.*, that the plaintiff, being possessed of a certain letter, had

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(a) 12 *East*, 38.(b) 5 *Taunt.* 36.(c) 1 *New Ca.* 490.

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given it to the defendant. It is true that the defendant was alleged to have made a beneficial use of the letter; but that was not an essential part of the consideration. Here the defendant could judge of the value of the document, and, using his judgment, made the promise. He cannot now annul it on the ground that the instrument was of no value.

Sir *J. Campbell*, Attorney General, in reply. The last argument rests on a fallacious assumption. The bargain declared upon was, not for the delivery of a piece of paper, but for the release of a contract. It does not appear that the paper itself may not even now be in the plaintiffs' possession. The plea, that the guarantee was of no effect, agrees with this view of the case. The main argument on the other side, assuming the first guarantee to be void, is, in effect, that, because it was given up at the defendant's request, he is estopped from saying that such an abandonment was no consideration for his promise. But this is contrary to the principle of many placita in *Com. Dig. Action upon the Case upon Assumpsit*, (F 8.), already cited. On those authorities, if the right foregone was in reality null, it cannot be material that the parties made their agreement on a contrary supposition. The question therefore really is, whether the first guarantee was valid or not. It is established by *Wain v. Warlters* (a) that, under the Statute of Frauds, no notice can be taken of a consideration not in writing; and in no instance has a guarantee been held good, where a sufficient consideration did not appear on the face of the instrument. In *Kennaway v. Treleavan* (b) *Parke B.* says, "I accede to the doctrine laid down by Lord *Denman*, in the case

(a) 5 *East*, 10.(b) 5 *M. & W.* 500.

of *Raikes v. Todd* (a), which has been referred to, that, in all these cases, the proper course is to look at the instrument, and see whether the consideration stated in it be the same with that alleged in the declaration, and no other." Here the attempt is to vary the consideration appearing on the instrument by parol evidence, which would virtually repeal the Statute of Frauds as to this point. It was not suggested in *Raikes v. Todd* (a) that the statement of consideration could be explained by oral testimony. *Tindal* C. J., in his judgment in *Hawes v. Armstrong* (b), lays it down that the consideration must appear by the writing itself, if not in terms, yet so "that any person of ordinary capacity must infer from the perusal of it, that such, and no other, was the consideration upon which the undertaking was given." Here the instrument, unassisted by extrinsic evidence, discloses no legal consideration. A past consideration would be none, unless a request were shewn. The second guarantee does not shew even a probability that the advance therein referred to was an advance at the defendant's request. And the words "in consideration of your being in advance" do not bear out the supposition that a future advance was contemplated. In *Morris v. Stacey* (c) the consideration relied upon was collected from the guarantee itself; and in *Boehm v. Campbell* (d) *Dallas* C. J. and *Burrough* J. refer to the written instrument only. [*Alderson* B. In both those cases the undertaking related to a debt already due; the consideration of forbearance might be inferred from that fact.] In *Shortrede v. Cheek* (e) the consideration

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Huish.

(a) 8 A. & E. 846.

(b) 1 New Ca. 761.

(c) *Holt*, N. P. C. 153.

(d) 3 B. Moore, 15.

(e) 1 A. & E. 57.

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was executory, and appeared sufficiently by the guarantee. *Stevens v. Lynch* (a), where the holder of a bill had given time to the acceptor, and the drawer waived the benefit of that circumstance, is not applicable to the present case. As to *Lee v. Muggeridge* (b), and the other cases which have turned upon moral obligation, it is sufficient to say that here no moral obligation appears for the first guarantee, and the declaration does not allege any consideration for the second guarantee but the abandonment of the first.

Cur. adv. vult.

Lord ABINGER C.B., in the same vacation (*June 29th*) delivered the judgment of the Court.

In the case of *Brooks v. Haigh* the judgment of the Court is, to affirm the judgment of the Court of Queen's Bench.

It is the opinion of all the Court that there was in the guarantee an ambiguity that might be explained by evidence, so as to make it a valid contract, and, therefore, this was a sufficient consideration for the promise declared upon.

It is also the opinion of all the Court, with the exception of my brother *Maule*, who entertained some doubt on the question, that the words both of the declaration and the plea import that the paper on which the guarantee was written was given up; and that the actual surrender of the possession of the paper to the defendant was a sufficient consideration, without reference to its contents.

Judgment affirmed.

(a) 12 *East*, 38.

(b) 5 *Tunst.* 36.

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IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

The QUEEN against JOHN HUMPHERY, Esquire.

INFORMATION in the nature of quo warranto, for using and exercising the office of an alderman of the city of London.

Plea, stating, first, the rights and customs and (in part) the by-laws, 21 R. 2. and 13 Ann. (a), of the city of London as to the election of aldermen, and the enactments of stat. 9 G. 4. c. 17. ss. 2, 3, 4. (b), that every person who shall thereafter be placed, elected, or chosen, in or to the office of mayor, alderman, &c., shall, within one calendar month next before or upon his admission into any of the aforesaid offices &c., make and subscribe the declaration specified in sect. 2, before the persons mentioned in sect. 3; and that if any person placed, &c. into any of the aforesaid offices or places shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing &c. shall be

Under stat. 9 G. 4. c. 17. sects. 2 and 3., which require that every person who shall be placed, elected, or chosen in or to the office of alderman, &c., shall, *within one calendar month next before or upon his admission* into such office, make and subscribe a certain declaration before certain parties, and sect. 4, which enacts, that, if he shall omit or neglect to make and subscribe the said declaration *in manner above men-*

tioned, such placing, election, or choice shall be void :

Held, by the Court of Queen's Bench, that the election is not void by refusal to make the declaration, or state whether the party will do so, unless he has first been admitted to the office by swearing in.

Judgment reversed on error, by the Court of Exchequer Chamber.

Held, by that Court, that the statute does not give the party elected a month at all events for deciding whether he will make the declaration or not, but only excuses him from making it at the time of admission, if he has made it within a month before.

That the words "upon his admission" mean at the time, and not within a reasonable time after, and that the authorities who admit may prescribe the order in which the ceremonies forming parts of the admission shall take place.

And that, if the party offers himself to the proper court to be admitted, not having made the declaration within a month before, and, being asked whether he will make it or not, declines to say, but requires the court to admit him, which they refuse, the election is thereupon void, and a precept may issue for a new election.

(a) These by-laws were cited exactly as they appear in *Res v. Johnson*, 5 A. & E. 489.

(b) More fully stated, p. 344. post.

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void, and it shall not be lawful for such person to do any act in the execution of the office &c. The plea then stated,

That, since the making and passing of the said act of parliament made and passed in the ninth year aforesaid, the said court of mayor and aldermen have required of every person who, since the passing of the said act, has been elected or chosen in or to the office of alderman of any ward of the said city that such person should make and subscribe the said declaration prescribed by the said act previously to taking and subscribing the oaths of office according to the several laws made and now in force for that purpose, towit at the city of *London* aforesaid:” “That, a vacancy having occurred in the place and office of alderman of the ward of *Aldgate* aforesaid, by the death of *John Thomas Thorpe*, Esq., late alderman thereof, a court of wardmote was holden on *Tuesday*, the 17th day of *November*, A. D. 1835, and continued by adjournments on other subsequent days in and for the said ward, before the Right Honourable *William Taylor Copeland*, then mayor of the said city, by virtue of a certain precept for that purpose before then duly issued according to the custom of the said city, for the election of an alderman of the said ward in the room and stead of the said *John Thomas Thorpe*; at which said court of wardmote one *David Salomons*, citizen and cooper, the said defendant, citizen and tallow chandler, and one *James Law Jones*, citizen and haberdasher, were respectively candidates for the said vacant place and office of an alderman of the ward of *Aldgate* aforesaid, towit at” &c.: “That, at the said last-mentioned court of wardmote, divers persons, inhabitants of the said ward, being
a majority

a majority of those then present at the said court, voted for the said *David Salomons* as and for such alderman, and by reason thereof the said *D. S.* claimed to be duly elected into the said place and office of alderman so vacant as aforesaid: and a return to the said precept, and of the result of the said election, was afterwards, to-wit on the 24th day of *November*, A. D. 1835, made into the said court of mayor and aldermen then duly holden in the Guildhall of the said city, according to the custom of the said city in that behalf, towit at" &c.: "That afterwards, towit on the 3d day of *December*, A. D. 1835, towit at" &c., "at a court of mayor and aldermen then holden at the Guildhall in and for the said city, the said *D. S.* did tender himself to the said court of mayor and aldermen at the said last-mentioned court for admission, and did then and there make claim, and did require, to be admitted to the said office of alderman of the said ward of *A.* as aforesaid; and thereupon the said *D. S.* was then and there requested by the said court of mayor and aldermen to make and subscribe in their presence the said declaration in the said act mentioned, the said mayor and aldermen then being the persons in the presence of whom, by the usage of the said city, the said declaration should be made and subscribed according to the provisions of the said act of parliament in that behalf, according to the several laws made and now in force for that purpose; but that the said *D. S.* did not, nor would, at the said court of mayor and aldermen so holden as last aforesaid, nor at any time within one calendar month next before or upon his admission, according to the true intent and meaning of the said act, into the said office of alderman of the said ward of *A.* as aforesaid, or at any other

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other time whatsoever, make and subscribe the said declaration, but wholly omitted and neglected so to do : by reason whereof, and by force of the said statute in that case" &c., "the placing, election, and choice of the said *D. S.* into the said place and office of alderman of the said ward of *A.*, as aforesaid, became and was void, towit at" &c. : "That, the said *D. S.* so having omitted and neglected to make and subscribe the said declaration required by the said act of parliament, the said court of mayor and aldermen, so holden as last aforesaid, did thereupon, at the said last-mentioned court, declare and adjudge the election of the said *D. S.* into the said place and office of alderman of the said ward of *A.* as aforesaid to be void, and did also then and there resolve that a fresh precept should issue for a court of wardmote to be held for the election of a fit and proper person to be alderman of the said ward of *A.* in the room and stead of the said *John Thomas Thorpe* Esq., deceased, towit at" &c. : "That, the said vacancy in the said place and office of alderman of the said ward of *A.*, by the death of the said *John Thomas Thorpe*, Esq., not having been filled up, a certain other court of wardmote was holden on *Tuesday* the 8th day of *December*, A. D. 1835, in and for the said ward of *A.*, before the Right Honourable *William Taylor Copeland*, then mayor of the said city, by virtue of a certain other precept for that purpose before then duly issued according to the custom of the said city, for the election of an alderman of the said ward in the room and stead of the said *J. T. T.* Esq., deceased ; in which last-mentioned precept it was stated that *David Salomons* Esq., returned to the court of mayor and aldermen to be alderman of the said ward, having (a)

(a) Sic.

omitted

omitted and neglected to make and subscribe the declaration directed to be made and subscribed by the said act of parliament made and passed in the ninth year of the reign aforesaid in manner in the said act mentioned, by reason whereof (a) the election of the said D. S. had, by virtue of the said act, become void, towit at" &c. "That at the said last mentioned court of wardmote this defendant, citizen and tallow-chandler, was the only candidate for the said place and office of an alderman of the said ward of A., towit at" &c. "That at the said last mentioned court of wardmote divers persons, being inhabitants of the said ward, and being a majority of those then present at the said court, voted for the defendant as and for such alderman; and by reason thereof the said defendant was duly elected into the said place and office of alderman of the said ward of A., so vacant as aforesaid, and a return to the said last mentioned precept, and of the result of such last mentioned election, was afterwards, towit on the 17th day of *December*, A. D. 1835, made unto the said court of mayor and aldermen then holden in the *Guild-hall* of the said city, according to the custom of the said city in that behalf, towit at" &c. The plea then stated that at the last mentioned court, holden &c., that is to say on *December* 17th, 1835, the defendant appeared before the court, and, having made and subscribed the declaration, was then and there duly sworn and admitted &c., and then and there took and subscribed the oaths, and made and subscribed the declaration according to the several laws made for that purpose; by reason of which several premises he the defendant then and there took upon himself the said

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place and office, &c., and from thence continually & and by that warrant &c. Traverse of the usurpation. Verification.

Replication. That by the said by-law of 13 *Ann.* was also enacted that, in case the person so duly elected alderman, and returned, by the Lord Mayor or other person duly authorized to hold such wardmote, to the said court of mayor and aldermen within the time that purpose by the laws of the said city limited and appointed, should refuse to take upon him the said office and unless he could discharge himself therefrom by the laws of the said city, he should be subject to all pains and penalties which might be inflicted on him by the by-laws and customs of the said city." That, by an act of Common Council of 17th *April*, 52 *G. 3.*, it was amongst other things, enacted, "that, upon any vacancy by death or resignation of any person being an alderman of the said city of *London*, the lord mayor of the said city for the time being should, within eight days next after such death or resignation, *Sundays* excepted, cause a wardmote to be duly summoned and held for the election of a fit and able person to be alderman of such ward or wards respectively where such vacancy should happen, and returning such person so elected to the said court of lord mayor and aldermen of the said city. And that by the said act of common council was also enacted that, if any person free of the said city should be thereafter duly elected alderman of any of the said wards of the said city according to the custom of the said city, and, notice of such election being given to him, or left in writing for him at the last place of abode, shall not personally appear before the court of the lord mayor and aldermen for the time being, in

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Inner chamber of the *Guildhall* of the said city at the next court there to be holden, not having a reasonable excuse for such his not appearance, and then and there to take upon himself the said office and charge of alderman of the said city and of the said ward whereof he shall be elected alderman, or if such person so elected shall, before the court of lord mayor and aldermen, openly declare his refusal to take upon him the said office, then any such person who shall so neglect or refuse to appear, or who appearing shall declare his refusal as aforesaid, shall forfeit the sum of 500*l.* of lawful" &c., "to the use of the mayor and commonalty and citizens, unless he shall be duly discharged of the said office of alderman for defect or want of ability in wealth, upon oath taken as by the said act of common council is required, which said forfeiture and penalty is by the said act declared to be recoverable by an action of debt in the name of the chamberlain of the said city for the time being in any of his Majesty's courts of record." "That, after the said return to the said precept, and of the result of the said election, was made to the said court of the mayor and aldermen, a certain notice in writing was served upon the said *David Salomons* by an officer of the said court of mayor and aldermen, personally to appear before the said court on the 3d day of *December* last, at the *Guildhall* in the said city, and then and there to take upon himself such office and charge of alderman of the said ward: and that, in pursuance of the said notice, and in obedience to the said last-mentioned act of common council, he, the said *D. S.*, did, on the said 3d day of *December*, and within the space of one month next after the day of his election to the said office of alderman of the said ward of *A.*, present him-

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self to the said court of mayor and aldermen, and then and there expressed his readiness and desire to be sworn for the due execution of the said office of alderman, and also to take and subscribe the oaths according to the said laws made for those purposes, and to assume and take upon himself the duties and burthen of the said office, and did there demand and make claim to be admitted alderman of the said ward of *A.* by virtue of the said election, and of the return thereof duly made as aforesaid to the said court." "That, when he the said *D. S.* so appeared and presented himself to the said court pursuant to the said notice, the said court demanded of him, the said *D. S.*, whether he had signed the declaration required by the said act of Parliament made and passed in the 9th year" &c., "entitled" &c. (9 G. 4. c. 17.), "within the space of one month next before his then application for admission, to which the said *D. S.* then answered that he had not; whereupon the said court demanded of him the said *D. S.* whether he would make and subscribe the said declaration: whereupon the said *D. S.* declined to say whether he would or not, but required the said court of mayor and aldermen to admit him to the said office, which the said court of mayor and aldermen did then and there, and within the space of one month from the day of the election of the said *D. S.* to the office of alderman of the said ward, positively refuse to do; and the said court of aldermen did then and there declare the election of the said *D. S.* to the said office to be null and void, and thereupon directed a precept to issue from the said court for the election of another alderman for the said ward of *A.*" And "that afterwards, towit on the 5th day of December, and within the space of one month next after the election of the said *D. S.*, and the return thereof to

the said court of mayor and aldermen, a certain precept issued from the said court of mayor and aldermen, and that by virtue thereof a certain court of wardmote was, on the 8th day of the said month, and within the space of one month next after the election of the said *D. S.* as aforesaid, holden for the said ward of *A.*, before *W. T. Copeland*, then mayor of the said city, for the purpose of electing an alderman of the said ward, at which said last-mentioned wardmote the said *John Humphery* was declared to be elected alderman of the said ward of *Aldgate*. Verification.

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General demurrer, and joinder. (There were other matters replied, as to which issues of fact were joined.) The demurrer was argued in the Court of Queen's Bench in *Easter* term, 1838 (*a*).

Sir *J. Campbell*, Attorney General, for the defendant. The question is, whether Mr. *Salomons* had a right to be admitted without making the declaration. If not, the office was void, and the defendant was rightly elected; if Mr. *Salomons* had such a right, the office was not void, and judgment must be given for the Crown. If he could claim to be so admitted, stat. 9 G. 4. c. 17. s. 2. will be inoperative; and stat. 5 & 6 W. 4. c. 28. was needless.

By 2 stat. 13 C. 2. c. 1. s. 12. it is enacted that, after the expiration of the commission of the then corporation commissioners, "no person or persons shall for ever hereafter be placed, elected or chosen, in or to any the offices or places aforesaid" (including aldermen, and other persons bearing employment relating to the government of corporations, sect. 4.), "that shall not have

(a) April 25th and 27th, before Lord Denman C. J., Littledale, Paterson, and Coleridge Js.

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within one year next before such election or choice, taken the sacrament of the Lord's Supper, according to the rites of the Church of *England*;" "and in default hereof, every such placing, election and choice is hereby enacted and declared to be void." This provided a preliminary test for officers. Then a subsequent test is provided by stat. 25 C. 2. c. 2. s. 2., which enacts, with respect to every person that shall be "admitted, entered, placed or taken into any office or offices civil or military," that "all and every such person and persons so to be admitted as aforesaid, shall also receive the sacrament of the Lord's Supper, according to the usage of the Church of *England*, within three months after his or their admittance in or receiving their said authority and employment, in some public church," &c. And stat. 16 G. 2. c. 30. s. 3. enlarges the time given by the last-mentioned act from three months to six months.

Stat. 9 G. 4. c. 17. recites these acts, and repeals them so far as relates to taking the sacrament. It then provides substitutes, first, by ss. 2, 3, 4, for the preliminary test, and next, by sect. 5, for the subsequent test. Sect. 2 recites that "it is just and fitting, that the repeal of such parts of the said acts as impose the necessity of taking the sacrament of the Lord's Supper according to the rites or usage of the Church of *England*, as a qualification for office, a declaration to the following effect should be substituted in lieu thereof," and enacts that every person who shall thereafter be placed, elected, or chosen in or to the office of alderman, &c., "or in or to any office of magistracy, or place, trust, or employment relating to the government of any city, corporation, borough, or cinque port within *England* and *Wales* or the town of *Berwick-upon-Tweed*, shall, with-
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one calendar month next before or upon his admission into any of the aforesaid offices or trusts, make and subscribe the declaration following:" which is the declaration, upon the true faith of a Christian, that the party will not exercise any power, authority, or influence, which he may possess by virtue of the office, to injure or weaken the Church, &c. Sect. 3 enacts "that the said declaration shall be made and subscribed as aforesaid, in the presence of such person or persons respectively, who, by the charters or usages of the said respective cities," &c., "ought to administer the oath for due execution of the said offices or places respectively, and in default of such, in the presence of two justices of the peace of the said cities," &c., "if such there be, or otherwise in the presence of two justices of the peace of the respective counties, ridings, divisions, or franchises wherein the said cities," &c., are; "which said declaration shall either be entered in a book, roll, or other record, to be kept for that purpose, or shall be filed amongst the records of the city," &c. Sect. 4 enacts "that if any person placed, elected, or chosen into any of the aforesaid offices or places, shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing, election, or choice shall be void; and that it shall not be lawful for such person to do any act in the execution of the office or place into which he shall be so chosen, elected, or placed." Sect. 5 enacts "that every person who shall hereafter be admitted into any office or employment, or who shall accept from his Majesty, his heirs and successors, any patent, grant, or commission, and who by his admittance into such office or employment or place of trust, or by his acceptance of such patent, grant, or

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commission, or by the receipt of any pay, salary, fee, or wages by reason thereof, would, by the laws in force immediately before the passing of this act, have been required to take the sacrament of the Lord's Supper according to the rites or usage of the Church of *England*, shall, within six calendar months after his admission to such office, employment, or place of trust, or his acceptance of such patent, grant, or commission, make and subscribe the aforesaid declaration, or in default thereof his appointment to such office, employment, or place of trust, and such patent, grant, or commission shall be wholly void."

Now, in interpreting sects. 2, 3, 4, which provide the substitute for the preliminary test, the only sound principle must be to understand the enactments of those sections as creating a preliminary test also. Therefore, as, by 2 stat. 13 C. 2. c. 1. s. 12., the election of any person not having, within one year before the election, taken the sacrament, is declared void, so the admission of any party not having, before the admission, made the declaration, would be void also. And the words of stat. 9 G. 4. c. 17. s. 2., "within one calendar month next before or upon his admission," must be understood to point to something to be done antecedently to the actual admission. The word "upon" is ambiguous in itself: it may mean "after," "concurrently, or "before." If a rule be made absolute for a new trial upon payment of costs, the costs should regularly be paid before the new trial takes place. [*Littledale* "Upon" there rather means "on condition of."] It would mean a condition precedent. [*Patteson J.* According to your argument the declaration here should follow the admission.] The use of the word is various;

it seems to mean either "at the time," or "before." *ridge J.* If it meant "before," the words would mean month "before or before the admission."] "Upon" did not then be merely superfluous: the effect of the amendment would be that the party, if he had not made declaration within one month of the admission, must immediately before the act of admission. Or it might mean "at the time of" the admission. Then the order in which the concurrent acts of a single proceeding are to take place is clearly to be regulated by the party presiding over such proceeding. Therefore the court of aldermen were justified in treating Mr. *Salomons's* refusal, either to make the declaration or to say whether he would or would not make it, as a refusal to make it at the time of the admission; so that the election, by sect. 4, was void.

It may be argued that "one calendar month next to or upon his admission" means a month before the month after; and that, therefore, Mr. *Humphery* might not have been elected and admitted within the month, Mr. *Salomons* having that time for making the declaration. But this construction is not borne out by the language; nor can the legislature be supposed to have meant that a party, after his election, should have a month given him for the purpose of considering his religious or other objections to the declaration. He is supposed to be qualified at the time of the election. What was to be done, as to the office, in the meantime? It is immaterial how soon after Mr. *Salomons's* refusal the defendant's election took place.

Section 5 of stat. 9 G. 4. c. 17. provides a subsequent test in lieu of the subsequent test given by stat. 25 C. 2. s. 2., to the provisions of which it manifestly refers.

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1839. This shews that sects. 2, 3, 4, of stat. 9 G. 4. c. 17. were intended to furnish a substitute for the enactments of 2 stat. 13 C. 2. c. 1. s. 12., which created a preliminary test. And, as sect. 5 of stat. 9 G. 4. c. 17. provides for making the declaration within six months after the admission, it cannot be supposed that sect. 2 meant also to order a declaration to be made within one month after the admission. Sect. 2 relates to a declaration to be made before, sect. 5 to a declaration after, being admitted. [*Patteson J.* Was a person to make two such declarations? Do the enactments refer to the same persons? Did stat. 25 C. 2. c. 2. s. 2. relate to corporation officers?] The words are, "any office or offices civil or military," which clearly include corporation offices. If the words "by reason of any patent or grant of his majesty" are taken to govern all that precede, still offices in a chartered corporation are held under a grant of the crown, and so within the clause.

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The legislature must have introduced stat. 9 G. 4. c. 17. with the knowledge that an annual Indemnity Act has always been passed, since 1743. The Indemnity Act in force at the time of *Mr. Salomons's* election was stat. 5 & 6 W. 4. c. 11. (a). The act of indemnity, after reciting (among others) 2 stat. 13 C. 2. c. 1., stat. 25 C. 2.

c. 2.,

(a) The same, in all parts material to the present case, with stat. 1 W. 4. c. 26., except as to dates. The enactment is, "That all and every person or persons who, at or before the passing of this act, hath or shall have omitted to take and subscribe the oaths and declarations, or otherwise to qualify him, her, or themselves, within such time and in such manner as in and by the said acts" (including 2 stat. 13 C. 2. c. 1., 25 C. 2. c. 2., 9 G. 4. c. 17., 10 G. 4. c. 7.) "or any of them is required, and who, after accepting any such office, place, or employment, or undertaking any profession or thing, on account of which such qualification ought to have been had and is required, before the passing of this act hath or have taken and subscribed the said oath or made the declarations required by law,

c. 2., and stat. 9 G. 4. c. 17., indemnifies parties who have accepted office without taking the oaths or making the declaration in proper time, if they have subsequently done so, or do so by a day named, before which the next Indemnity Act always passes. Therefore, if Mr. *Salomons* had been admitted without making the declaration, the security intended by stat. 9 G. 4. c. 17. would never have taken effect at all.

Stat. 5 & 6 W. 4. c. 28. recites stat. 9 G. 4. c. 17. ss. 2, 4., and that there was a doubt whether these clauses

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law, or who, on or before the 25th day of *March* 1836, shall take and subscribe the oaths, declarations, and assurance respectively, in such cases wherein by the said several acts or any or either of them the said oaths, declarations, and assurance ought to have been taken and subscribed, in such manner and form, and at or in such place or places, as are appointed in and by the said several acts or any or either of them, shall be and are hereby indemnified, freed, and discharged from and against all penalties, forfeitures, incapacities, and disabilities incurred or to be incurred for or by reason of any neglect or omission, previous to the passing of this act, of taking or subscribing the said oaths or assurance, or making or subscribing the said declarations respectively, or taking or subscribing the said oath, according to the above-mentioned acts or any of them, or any other act or acts; and such person or persons is and are and shall be fully and actually recapacitated and restored to the same state and condition as he, she, or they were in before such neglect or omission, and shall be and be deemed and adjudged to have duly qualified him, her, or themselves according to the above-mentioned acts and every of them; and that all elections of, and acts done or to be done by, any such person or persons, or by authority derived from him, her, or them, are and shall be of the same force and validity as the same or any of them would have been if such person or persons respectively had taken the said oaths or assurance, and made and subscribed the said declarations respectively, and taken and subscribed the said oath, according to the directions of the said acts and every or any of them; and that the qualification of such person or persons qualifying themselves in manner and within the time appointed by this act shall be to all intents and purposes as effectual as if such person or persons had respectively taken the said oaths and assurance, and made and subscribed the said declarations respectively, and taken and subscribed the said oath, within the time and in the manner appointed by the several acts before mentioned."

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applied to sheriffs of cities, or towns being counties; and it enacts that no person elected to such office of sheriff shall by reason thereof "be liable to make or subscribe the aforesaid declaration within one calendar month next before or upon his admission to the said office." But this would have been unnecessary, if an officer, under the enactments of stat. 9 G. 4. c. 17. s. 2., might postpone the declaration till after admission; since, after admission, he would have been protected by the annual Indemnity Act.

By the Roman Catholic Emancipation Act, stat. 10 G. 4. c. 7. s. 14., Roman Catholics are enabled to hold office, &c., in corporations, "upon" taking and subscribing the oath there set forth. It may be shewn that this oath must be taken before admission; and sect. 2., as to members of either house of parliament, is to be construed in the same way. [Sir *F. Pollock*, for the Crown, assented to this.] The intention of the legislature must have been the same here as in stat. 9 G. 4. c. 17., though the expressions are not strictly alike.

It will be argued that Mr. *Salomons* is protected by the annual Indemnity Act. But he is not within its terms. He has not been admitted. The case which has gone farthest on these acts is *In the matter of Steavenson (a)*, where it was held that the act protected, not only those who had already incurred the penalties or disabilities, but all who should do so while the act was in force. There the party was elected and admitted after the act passed. But here the penalty has not been incurred at all; Mr. *Salomons* never has been in the office. [Lord *Denman* C. J. Suppose he had a right to be

(a) 2 B. & C. 34.

admitted

admitted when he claimed.] This claim would not subject him to the penalty: and the act would still be inapplicable. But, further, Mr. *Salomons* cannot claim the benefit of the act, because he has not complied with the conditions; it is not alleged either that he has made the declaration, or that he is ready to do so. *Rex v. Parry* (a) shews what allegations are necessary to bring a party within the protection of the act.

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Sir *F. Pollock*, contra. The question is, not simply whether Mr. *Salomons* had a right to be admitted before making the declaration, but whether his election was avoided by his refusing to answer the question, so that the Court were entitled to issue a precept for a new one.

The Indemnity Act has nothing to do with the interpretation of stat. 9 G. 4. c. 17. It has been, in fact, passed annually for a long time; but it does not thereby become part of the permanent law; and its operation is made temporary only, with the intention that it shall not constitute such part of the law. According to the view suggested on the other side, its effect would be altogether to repeal the laws on the subject of qualifications and tests.

The word "upon," in sect. 2 of stat. 9 G. 4. c. 17., cannot mean "before." Its proper meaning is "after," or "as a consequence of." Numerous meanings are assigned to it in *Johnson's Dictionary*: but "before" is not among them. There is indeed, "at the time of; on occasion of." But *Johnson* adds, "It always retains an intimation, more or less obscure, of some

(a) 14 *East*, 549.

substratum

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substratum, something precedent, or some subject."

This agrees with the ordinary legal use of it, when the word is always followed by some condition or act which is to be precedent; as "a new trial upon payment of costs," where the payment of costs, as a condition or act, precedes the new trial. The argument that sect. 2 provided a substitute for that which under the previous law, preceded the admission, namely the taking the sacrament, cannot controul the ordinary sense of the word, especially in the interpretation of an act which restricts general rights. But further, the declaration was a substitute for all the tests before imposed. [*Patteson J.* The preamble in sect. 2 makes the declaration a substitute for taking the sacrament "as a qualification for office."] This does not shew that the declaration is to precede the taking of office: it is a substitute for all that was required by 2 stat. 13 C. 2. c. 1. s. 12. and stat. 25 C. 1 c. 2. s. 2. Even assuming that the declaration was to be made at the time of admission, why was the question to be put before the admission? [*Coleridge J.* Were not the court of aldermen to regulate the order of proceedings?] If the declaration made a part of the transaction, concurrently with the admission, Mr. Salomons might, at any time while that court was sitting make the declaration; therefore the precept which issued at the following court, in consequence of the resolution passed at the first court and the declaration there made that the election was void, was illegal. While the first court was sitting, the election could not be void. Even had Mr. Salomons, on the question being put, stated that he would not make the declaration, he might still have changed his mind, and have offered to do

do so while the first court was sitting. [Coleridge J. Suppose two persons had been elected to different offices, and each had refused to be admitted first, how could the court of aldermen proceed? What was to be done first?] That state of things did not in fact exist; and, had it arisen, it would have been premature to declare the election void. No moment can be pointed out at which the election became void, until the first court had broken up. The by-law of 13 *Anne* does not avoid the election, even upon the refusal of the party to take upon him the office; it only imposes penalties. Besides, it does not apply to a party claiming admission. Had Mr. *Salomons* not appeared at all at the first court, the election would not have been void; and therefore the precept under which the defendant was elected would have been illegal. [Littledale J. But Mr. *Salomons* did appear.] Still nothing passed, on his appearance, making the election null. There is no provision, by statute or by-law, avoiding the election under such circumstances; for stat. 9 G. 4. c. 17. s. 4. avoids it only upon the party's omission or neglect, and the refusal to answer the question is neither omission nor neglect to make the declaration. Neither can there be any common law principle avoiding the election. The court had no right to put the question; Mr. *Salomons* might answer, "You are to admit, and, upon my admission, I am to make a declaration; if I omit or neglect to do that, my election will be void: do your duty, and let me do mine." [Coleridge J. If Mr. *Salomons* had refused to answer the question whether he had already made the declaration, could the court thereupon have declared the election void?] They clearly could not. [Patteson J. Would you say that also as to the sacramental

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1839. mental test, under 2 stat. 13 C. 2. c. 1. s. 12., which was necessarily taken before admission?] The court, who were to admit, would have had no right there to put the question; it was for the party admitted to see that he had done all necessary to make his admission good; and, supposing the court (if the case had occurred under that statute), to have adjourned without declaring the election void, Mr. *Salomons* might have claimed admission at the following court, and have made the declaration. But, according to the argument on the other side, had he been then admitted, he could have been ousted by a quo warranto, the election having been avoided by what occurred at the previous court; for the declaration of avoidance by the court of aldermen can make no difference. Possibly, if he had been admitted, and then refused to make the declaration, the election would have been thereby avoided: but that has not occurred.

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Sir *J. Campbell*, Attorney General, in reply. It must be taken, on this record, that Mr. *Salomons* refused to make the declaration. The plea states that, on being required to make and subscribe it, he did not, nor would, at the court, nor at any time within one calendar month next before or upon his admission, according to the true intent or meaning of the act, or at any other time whatsoever, make and subscribe the said declaration, but wholly neglected and omitted so to do, whereby the election became void, by force of the statute. This is not traversed, but only, to a certain degree, explained in the replication. There is, therefore, a refusal on the record; and the only question is, whether the refusal avoided the election.

It

It is denied, on the part of the Crown, that sect. 2 of stat. 9 G. 4. c. 17. points to a substitute for the prior test in 2 stat. 13 C. 2. c. 1. s. 12. rather than for the subsequent test in stat. 25 C. 2. c. 2. s. 2.: but the prior test was the only one provided "as a qualification for office," which are the words used in the preamble to sect. 2 of stat. 9 G. 4. c. 17.: it is, therefore, to that statute only that the section applies.

By 2 stat. 13 C. 2. c. 1. s. 13. it is enacted "that every person who shall be placed in any corporation by virtue of this act, shall *upon* his admission take the oath or oaths usually taken by the members of such corporation." Could it be contended that the party was to be admitted first, and take the oaths afterwards? [Lord Denman C. J. On comparing sect. 12 with sect. 13, it does not appear that any order of proceedings is prescribed.] The legal interpretation has always been that the oaths of office should be taken before the admission. [Coleridge J. Does the admission consist in any thing besides administering the oath of office?] It seems to be a series of acts; the last probably is the subscription of the name in the books of the corporation. [Coleridge J. Can that be essential to his being an alderman?] In the pleadings in *quo warranto* there were usually two issues, one traversing the swearing in, the other traversing the admission.

Then, the court of aldermen were bound to make the enquiry; for, by sect. 3 of stat. 9 G. 4. c. 17., the party, if he does not make the declaration before those who are to administer the oath of office, is to take it before justices. [Lord Denman C. J. The words are "in default of such:" that looks as if what took place before those who administer the oath of office was not necessarily final.] Those words determine nothing as

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to the time; they shew only before whom the declaration is to be made, whatever be the proper time. It cannot be contended that, after admission by the court of aldermen, the party could go and take the oaths elsewhere. [Lord *Denman* C. J. Could the officer who admits defeat the election by quitting the court without receiving the declaration?] That case seems not to be provided for by the act. It is said that, under the old law, the party was not bound to answer the question whether he had taken the sacramental test; but that seems to be contrary to *Rex v. Hawkins* (a). [Patteson J. Could he make the declaration previously to the court at which he is admitted? Can the words "in default" leave the matter to the option of the parties?] They seem to mean "in the place of." [Lord *Denman* C. J. Suppose the party answered the question as to the sacramental test in the affirmative, must the Court have received his answer, or could they enquire further?] He would answer at his own peril. In *Rex v. Hawkins* (a) Lord *Ellenborough*, upon the authority of *Williams v. The East India Company* (b), considers that a party must be presumed to have taken the test, if he so declare. [Patteson J. It was, in some cases, usual for the party to bring some one with him who had seen him receive the sacrament.] By stat. 25 C. 2. c. 2. s. 3. a certificate was required as to the subsequent test.

It is asked at what period the vacancy took place? It took place at the moment of the refusal being made. There is no occasion to enquire whether, if the Court had adjourned for the purpose of not allowing the proceeding to be final, the vacancy would have been consummated.

Cur. adv. vult.

(a) 10 *East*, 211.

(b) 3 *East*, 192.

Lord

Lord DENMAN C. J., in the following term (*May 29th, 1838*), delivered the judgment of the Court. After stating the information, his Lordship proceeded as follows.

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The question on the pleadings turned out to be, whether the office of alderman, to which the defendant was elected, was or was not vacant at the time of such election; and this mainly depended upon whether the court of aldermen had done right in refusing to admit Mr. *Salomons*, who had before been duly elected alderman of the same ward, and directing a new precept to go for the election of another alderman, under which new precept the defendant was elected. The ground of their refusal to admit him was, that he had forfeited his office by the operation of the statute 9 G. 4. c. 17., inasmuch as he had not made the declaration required by that statute within a month, and, when questioned, declined to answer whether he was willing to make it on being admitted.

On looking at the statute, we are of opinion that, as the declaration is to be made upon admission, and to be made in the presence of those who by charter or custom are to administer the oaths of office, the admission is the first thing to be done; that the Court of aldermen ought to have admitted him by administering the oaths of office; that he, when so admitted, had the option of making or declining to make the declaration; and that, till he had declined upon admission, none of the consequences attached by the act to refusal accrued. We therefore think the office was not vacant at the time when the precept issued, and of course that the defendant has not been well elected. Our judgment must be for the Crown.

Judgment for the Crown.

B b 2

A writ

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A writ of error was brought upon this judgment. The errors assigned were, that the plea first pleaded in reply was insufficient in law: that, when the precept issued on *December 5th*, 1835, for electing an alderman of the ward of *Aldgate*, the said office was vacant, and that the election of the said *John Humphery* thereupon was legal and good: and that judgment was given for the Crown, whereas &c. (the common assignment of error). The writ of error was argued in *Hilary* vacation, 1839, *February 4th*, before *Tindal C. J.*, *Bosanquet*, *Vaughan*, and *Coltman Js.*, and *Parke*, *Alderson*, and *Gurney Bs.*

Sir J. Campbell, Attorney General, for the plaintiff in error, the defendant below. The judgment of the Court below repeals the clauses of 9 G. 4. c. 17. which require a declaration in lieu of the sacramental test, and defeats the purpose of the legislature, which was, when abolishing that test, to provide, by means of the substituted declaration, that the offices specified should not be filled by persons who could not profess that they were Christians. Such a construction is inconsistent with the policy of stat. 5 & 6 W. 4. c. 76. s. 50., which retains the declaration, and would have made it needless to introduce the act 5 & 6 W. 4. c. 28., which was passed on *Mr. Salomons* being elected sheriff of *London*. It is contended for the Crown that the practice alleged in the plea to have prevailed ever since the statute 9 G. 4. c. 17. was passed, of requiring every person elected alderman to subscribe the declaration before taking the oaths of office, is illegal, and that the party elected may require the oaths to be administered first. The defendant insists that, if administering the oaths is the admission, and it is consummated by that act, the declaration

claration ought to be made first ; and, further, if it is necessary to argue that point, that the declaration is part of the ceremonies of admission ; that the admission is not consummated without it ; that the lord mayor and aldermen may direct the order in which the ceremonies shall be performed ; and that, if they require the declaration to be made first, and the party elected refuse then to make it, the election is thereby void.

As to the first point ; the judgment of the Court below does not enter into any discussion of the statute 9 G. 4. c. 17., of the other acts in *pari materiâ*, or of the Indemnity Acts ; and these do not appear to have been sufficiently considered. Not only particular words or enactments, but the whole scheme and tendency of these acts should be looked at. (He then commented on the several statutes, taking the same course of argument as before the Court below.) [*Alderson* B. observed that stat. 9 G. 4. c. 17. s. 2. required the declaration to be made by every person who should be "*placed*, elected, or chosen" (not *admitted*) "in or to the office of mayor, alderman," &c.; and sect. 4 made such "*placing*, election, or choice" void, in case of omission.] It is contended for the Crown that the lord mayor and aldermen, in giving the admission, exercise only a ministerial function, are not authorised to put a question to the candidate, and must leave him to make the declaration at whatever time he pleases. But it was their right and duty to enquire whether he had signed the declaration. They were to see the law properly enforced ; and the election was void if the declaration was not made within a month next before, or upon, the admission. Under the old law, according to *Rex v. Haw-*

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kins (a), a candidate for the office of alderman might be asked even by an individual elector, at the time of election, whether he had taken the sacrament within a year. The word "upon" may be so used as to signify after; but it may also mean before or at the time; and it must receive a reasonable construction, according to the nature of the thing to be done, and the object for which it is required. Making the declaration after being admitted would be no test. If the candidate, on coming to be admitted, states that he has not made the declaration, and, on being asked then to make it, refuses, the election is void *eo instanti*; the statutes nowhere require the interval of a month before another person can be elected. (Nothing material was added, on this point, to the argument below.) Secondly, the true construction being that the declaration shall be made at the time of admission, it forms one of the acts in which the admission consists; and the Court before which that ceremony takes place must regulate its order. An attorney, on being admitted in this court, could not claim to determine whether he should take the attorney's oath or the oath of allegiance first. There is no hardship in requiring that the candidate shall be ready at once to say, whether he objects to the declaration; and it would be very inconvenient, where there were several persons, if all might reserve their answer on this point till the last moment of the Court's sitting. It may be contended that stat. 9 G. 4. c. 17. must be strictly construed, being penal. It is not, however, properly penal, for it is a relaxation of former penal acts; and the conditions of that relaxation ought not to be explained away.

(a) 10 *East*, 211.

Sir

Sir *F. Pollock*, *contra*. As to the last argument, although this act relaxes some provisions of the earlier statutes, it still imposes restraints which did not originally exist, and is so far against common law rights, and therefore to be construed strictly. The observation, that the judgment below will impliedly repeal stat.

9 G. 4. c. 17., supposes that an indemnity act will pass every year: but that is not to be assumed; and the statute must be construed according to its own language. This act substitutes certain provisions for those of the Corporation and Test Acts; but it does not follow that the enactments of those statutes furnish a rule for construing the acts substituted for them. The question is, whether, under the present act, the court of lord mayor and aldermen had a right to pronounce the election of Mr. *Salomons* void on his refusal, before admission, to say that he would make the declaration. A distinction was suggested from the Bench, during this argument, between the words "placed" in sects. 2 and 4, and "admitted" in sect. 5. [*Alderson* B. "Placed" probably means an appointment in any other mode than by election.] The words "placing, election, or choice" seem to have been adopted from 2 stat. 13 C. 2. c. 1. s. 12. "Placing" is opposed to "removing," in the preamble to that act, in a manner which seems to imply an admission. [*Alderson* B. Sect. 13 of that statute enacts, "That every person who shall be *placed* in any corporation by virtue of this act, shall upon his *admission* take the oath or oaths usually taken by the members of such corporation." The statute probably used the general term "placing" as applicable to whoever might have the power to place in the particular office. Sect. 9 shews this; and, under the old corporation law, if a charter

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expired and a new corporation was constituted, the new officers would be *placed* by the Crown.] It is at least so far doubtful whether placing does not include admission, that no inference can safely be drawn, from the use of this word, in favour of the defendant's construction of stat. 9 G. 4. c. 17. ss. 2, 4. Then, further, the pleadings here do not shew that the office had become void when the defendant was elected. It is nowhere said that *Salomons* refused to make the declaration. He omitted to do so at the court holden on *December 3d*; but, by the statute, he should have had a month for doing it, from the time of his election. At the court in question the functions of the lord mayor and aldermen, as to admitting, were ministerial only. [*Tindal* C. J. If they had actually admitted, it does not seem certain that the admission would have been void, as sect. 4 of stat. 9 G. 4. c. 17. avoids only the "placing, election, or choice."] Supposing, as is contended on the other side, that taking the declaration is part of the proceedings on admission, yet, in point of order, it ought to follow the act of admitting. "Upon," here, means "after, within a reasonable time." By stat. 10 G. 4. c. 7. s. 14., Roman catholics may hold office *upon* taking certain oaths: that clearly means *after*. The same construction prevails where a settlement is to be made *upon* marriage, or a penalty to accrue *upon* conviction, or *upon* default or refusal. [*Bosanquet* J. So, where a reward is to be paid *upon* conviction of an offender. *Alderson* B. In most of the cases put, "upon" is used elliptically for "upon condition of." *Parke* B. Where a thing is to be done "upon payment of costs," it is so. *Tindal* C. J. There are instances where it refers to consideration. In the case of copyhold fines, "on admission" has been held to

to mean "after."] It never means "before." The lord mayor and aldermen in this case should, at least, have expressed an intention to admit Mr. *Salomons* if he would make the declaration. As the case stands upon the pleadings, he calls on them to admit him; they, in answer, demand of him whether he has signed the declaration; he replies that he has not: they ask if he will do so; he declines to say whether he will or not, but requires them to admit: they refuse to do so, and thereupon declare the election void, and direct a precept for a new one. It is not necessary even to contend that they ought to have admitted him first, and then tendered the declaration: it is enough to say, that on his answering, "I will not tell you whether I will subscribe or not," the office was not void. This was not an omitting or neglecting to make the declaration, within stat. 9 G. 4. c. 17. s. 4. The question is, at what moment the office can be said to have become void? It did not upon Mr. *Salomons's* refusal to say whether he would make the declaration or not; for he might afterwards have offered to do it. [*Tindal* C. J. That would have altered the case very much; but it is not stated that he did.] He retained the right. The vacancy ought not to have been declared till another court was holden. [*Parke* B. Has the declaration of a vacancy any effect? If the office was void by law, was any judgment of the mayor and aldermen required?] At any rate, when he declined to say whether he would subscribe or not, they might, at his request, have adjourned, to give him time; and, if so, the office was not already void. But, even if it was void within sect. 4, it was not so to all intents, until legally called in question and determined. Sect. 9 shews that, for some purposes, the party might be

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1839. be an efficient officer. [*Alderson B. cited The Margate Pier Company v. Hannam (a).*]

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Sir *J. Campbell*, Attorney General, in reply. The relator must establish that there could be no vacancy till a month had elapsed after the election, however positively the party elected might say that he never would make the declaration. Here, the conduct amounted to a refusal. [*Alderson B.* The object contemplated in using the words "within one calendar month *next before or upon* his admission" was to allow the benefit of a declaration made before the admission, but yet to bring it as near as possible to the time of admitting, that it might not be suggested that the party had changed his mind in the interim. The words cannot have been intended to protect parties who hesitated whether they should take the declaration at all.] The word "placed" means, simply, "appointed without election," as in the case of a new charter, and in other instances, where the Crown nominates. Sect. 9 of stat. 9 G. 4. c. 17. gives validity to certain acts, but that is where they are done ignorantly; and the protection is for the benefit, not of the party exercising an office, but of those claiming under him. [*Parke B.* You say that when the party applies for admission, and omits to make the declaration, the office is void. Suppose he does not appear at the first or second court after his election; if he applies for admission at the third, has the office become void?] Not if he has never appeared; but if he comes, voluntarily or otherwise, and then does not make the declaration, it is void.

(a) 3 B. & Ald. 266.

Some of the arguments for the Crown, not materially differing from those used in the court below, are omitted.

Then

Then as to the effect of the word "upon." [*Alderson B.* The question must always be, whether the thing to be done, which follows that word, is made a condition or not.] That is so, whatever be the form of expression. Here, making the declaration is the condition of being admitted. [*Parke B.* You say that he never has more than one option of being admitted or not.] There is no reason that, when he appears, he should have more. As to declaring the avoidance, there is no need that the lord mayor and aldermen should do it; the law itself makes the adjudication.

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Cur. adv. vult.

TINDAL C. J. in this term, *June 4th*, delivered the judgment of the Court.

In this case, the Court of Queen's Bench gave judgment in favour of the Crown upon a quo warranto information filed against the defendant, for exercising the office of alderman of the ward of *Aldgate*, in the city of *London*. The pleadings raise the question on demurrer, whether, at the time of issuing the precept by virtue of which the defendant below was elected alderman, the office was void, by reason of *Mr. Salomons*, who had been elected alderman of that ward upon a vacancy by death, having neglected to comply with the provisions of stat. 9 G. 4. c. 17. s. 2.

Mr. Salomons had not made and subscribed the declaration, required by that act, before he tendered himself to the court of mayor and aldermen for admission into the office of alderman; and upon his so tendering himself, as it is averred in the plea, "the said *David Salomons* was then and there requested by the said court of mayor and aldermen to make and subscribe in their

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presence the said declaration in the said act mentioned,* but “the said *David Salomons* did not, nor would, at the said court of mayor and aldermen so holden as last aforesaid, nor at any time within one calendar month next before or upon his admission” “into the said office of alderman,” “or at any other time whatsoever, make and subscribe the said declaration, but wholly omitted and neglected so to do.”

The replication does not traverse this omission and neglect, but states the special circumstances, viz. that within the space of one month next after the day of his election, he presented himself to the court of mayor and aldermen, and demanded and made claim to be admitted; and that the Court demanded of him whether he had signed the declaration required by the said court within the space of one month next before his then application for admission; to which he answered, that he had not: whereupon the Court demanded of him whether he would make and subscribe the said declaration: whereupon the said *David Salomons* declined to do so, whether he would or not, but required the said Court admit him to the said office, which the said Court, then and there, and within the space of one month from the election of the said *David Salomons* to the said office of alderman, positively refused to do; and the said Court then and there declared the election of the said *David Salomons* to the said office to be null and void.

Upon this state of the pleadings, the Court is bound to assume that he omitted to make and subscribe the declaration at the time when the Court required him to do so; because the allegation in the plea, that he did omit and neglect, is not traversed, and it is expressly alleged in the replication that he would not say whether

he would do so or not after he should be admitted; and the question therefore becomes this, whether, by reason of such omission and neglect, Mr. Salomons's election became void: which question depends upon the construction which must be put upon the act of parliament, as to the time at which the declaration required by the statute must be subscribed and made.

The statute 9 G. 4. c. 17., after referring, in the first section, to the acts usually called the Corporation and Test Acts, and reciting the expediency of repealing so much of them as imposes the necessity of taking the sacrament of the Lord's Supper according to the rites or usages of the Church of *England*, proceeds to repeal such parts of the said acts. The second section, after reciting that the Protestant Episcopal Church of *England* and *Ireland*, and the doctrine, discipline, and government thereof, and the Protestant Presbyterian Church of *Scotland*, and the doctrine, discipline, and government thereof, are by the laws of this realm severally established, permanently and inviolably, and that it was just and fitting that, on the repeal of such parts of the said acts as impose the necessity of taking the sacrament as a qualification for office, a declaration, which is afterwards set forth, *should be substituted in lieu thereof*, proceeds to order, "That every person who shall hereafter be placed, elected, or chosen in or to the office of mayor, alderman," &c., "or in or to any office of magistracy, or place, trust, or employment relating to the government of any city," &c., "within *England* and *Wales* or the town of *Berwick-upon-Tweed*, shall, *within one calendar month next before or upon his admission* into any of the aforesaid offices or trusts, make and subscribe the declaration" therein set forth.

The third section specifies in the presence of what

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persons the said declaration shall be made and subscribed; and the fourth enacts that, "if any person placed, elected, or chosen into any of the aforesaid offices or places, shall omit or neglect to make and subscribe the said declaration in manner above-mentioned, such placing, election, or choice shall be void; and that it shall not be lawful for such person to do any act in the execution of the office or place into which he shall be so chosen, elected, or placed."

It is clear, from these recitals and provisions, that the legislature meant to open as well corporate offices as places in the gift and appointment of the Crown to every person professing the Christian faith, instead of confining them, as before had been the case, to those only who were willing to take the sacramental test: but it is equally clear that it intended that no one should exercise such an office unless he made and subscribed, the proper time, the declaration which is substituted instead of such sacramental test: and the only difficulty which is raised upon this record is, whether the proper time had arrived for holding the election of Mr. Salomons to be void, when he was required by the Court of mayor and aldermen to make and subscribe the declaration prescribed by the act, and when he omitted and neglected so to do.

And we are all of opinion that, upon the proper construction of the act, such time had then arrived, and that the non-compliance of Mr. Salomons with such requisition of the Court made his election to the office of alderman, ipso facto, void.

Upon two points which have been made in the course of the argument, on the part of the Crown, we have entertained no doubt. We think it clear that the statute

ute did not intend, by the second section, to give the period of one entire month to the person elected, within which he might decide whether he would make the declaration or not; and that the objection, that one month had not elapsed in this case between the election of Mr. *Salomons* and the application to be admitted, is entirely without foundation. The statute never could anticipate that any one would offer himself as a candidate for the office who had not already made up his mind to subscribe the declaration imposed by law; and the plain object of the provision contained in the second section appears to us to be that, if, at the time of being admitted, the person elected has already made the declaration so recently as within one month next before (but not at an anterior period), such making of the declaration shall be sufficient, and he cannot be called upon to make it again. Neither have we any doubt upon another point which was raised in the course of the argument, namely, that the legislature did not intend to give to the person elected a reasonable time *after* admission, for the purpose of making the declaration; for, in the first place, such are not the words of the act; nor could the legislature have ever contemplated that the propriety of making or not making the declaration was a subject which required any time for consideration. The words of the act, "upon his admission," do not, as it appears to us, mean *after* the admission has taken place, but *upon the occasion of*, or *at the time of* his admission: the words of that section shew the intention of the legislature to have been that the space of time commencing at the distance of one calendar month next before, and terminating with, the act of admission, should be the limit or period within which the declaration

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tion was required to be made; so that, if not made ~~at~~ an earlier time, the latest opportunity of making ~~it~~ would be at the same time and place at which the ~~oath~~ of office was administered, and before the same persons. In effect, the making of the declaration does, by ~~virtue~~ of those words, form a part of the act of admission, ~~and~~ is an essential requisite to the being permitted to ~~exer-~~cise the corporate office. And we hold it therefore ~~to~~ be unnecessary to refer to instances of the legal mean~~ing~~ of the word "upon," which, in different cases, may ~~un-~~doubtedly either mean *before* the act done to which ~~it~~ relates, or *simultaneously with* the act done, or *after the* act done, according as reason and good sense require the interpretation, with reference to the context, and the subject matter of the enactment. And consequently, ~~if~~, *immediately after* having been admitted in the same way as if this act had not been passed, Mr. Salomons had omitted and neglected to make the declaration, ~~his~~ election would unquestionably have been void, and ~~it~~ would have become the duty of the court of mayor and aldermen to have forthwith issued a precept for a new election.

But the point upon which the doubt, and the only doubt, in this case has arisen in our minds is, whether, upon the strict interpretation of the wording of the act, the election became void by the mere offer of the party elected to be admitted at the proper time when he ought to have been admitted, and by his omission or neglect at that time to make and subscribe the declaration required; or whether, as no admission had actually taken place in the old corporate form, that is, by taking the oath of office, the occasion had arisen upon which he

was bound to make the declaration and the Court the power to declare the election to be void.

seems, however, to us, that the more reasonable construction of the act, and the construction which will effectuate the intentions of the legislature, is, that, a person elected (not having qualified within the ending month by making the declaration) be not required (and much more if he decline to say whether he will do or not) to make and subscribe the declaration, but shall as take the corporate oaths, at the time and place at which his admission ought to take place according to the charter, by-law, law, or usage of the corporation, no incomplete or valid admission can take place at all; his admission could be at most but an idle form, since he could not be permitted, under section 4, "to do any act in execution of the office;" and that his election thereby becomes void. The declaration comes in lieu of the mental test; which, in the case of corporate offices, must have been taken, not only before the admission, but even the election of the party; it is a test of the required qualification for the office, both as indicating religious faith of the party, and furnishing a security, it is a solemn promise, against any injury to the Protestant church and its establishments. And, as the precise order in which each part of the act of admission is to take place is not defined by the statute, it is reasonable to hold, where there is any doubt as to which should precede the other, that the court of mayor and aldermen, being the proper court to give the admission, should prescribe the order in which the respective parts of admission shall be arranged; that they may first ascertain the qualification before they administer the oath of office, instead of adopting the course, which would be to require the declaration before the oath.

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might be useless, and which, if useless, would be improper, and might even lead to inconvenience, — that of first administering the oath, and afterwards ascertaining the qualification. There is no reason, therefore, why the admission, by administering the corporate oath of office, should first take place before the statutory declaration is made, but the contrary, as thereby this great inconvenience would follow, that the time during which the corporation remains without an officer must be unnecessarily extended.

And we think this construction is entirely consistent with the words of the statute. The second section is formed upon the supposition that the party elected will be completely admitted, and requires that he make the declaration either within a given time before, or at the time and on the occasion of his admission, superadding a new requisite to the old corporate form of admission. It is the fourth section which provides for the consequences of an omission or neglect to make that declaration. It enacts that, if the person elected shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing, election, or choice shall be void. The question, therefore, upon the words of this section, is, what is the proper meaning of the general words of reference, "in manner above mentioned?" And, coupling those words with the context, we think we are not bound to say that they mean at the time when a corporate admission has been actually completed; when it is clear from the context that an actual admission cannot be an available admission, unless the declaration is made, and that the person elected cannot, without such declaration made, exercise any corporate functions.

It

It is also not unworthy of observation that the words of the fourth section do not in terms provide that *the admission* shall be void, but *the election* only (for the word "placing" has no reference to admission, but only to appointment or title by any other mode than election or choice); and it can scarcely be conceived that, if an actual admission had been contemplated, the legislature would not have declared such admission to be void, by the refusal or omission to make the declaration.

Upon the whole, therefore, we hold the meaning of the statute to be, that it makes void the election, if the person elected (not having previously qualified within a calendar month) should omit or neglect to qualify himself by making the declaration at the time and occasion when he ought to be admitted; and that the useless form of a corporate admission is not necessary before the party can be called on to qualify according to the statute, and before the election can by law be declared to be void.

We therefore think that the judgment of the Court of Queen's Bench ought to be reversed.

Judgment reversed.

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(In the Matter of TIBBITS.)

A town clerk, who was in office at the passing of stat. 5 & 6 W. 4. c. 76., but who had been re-appointed afterwards, and subsequently dismissed by the council, applied for compensation, which the council refused. He then appealed to the Lords of the Treasury by memorial, and prayed therein to be heard by himself, his counsel, agents, or witnesses. The council sent in a memorial in answer, and the town clerk another in reply. The council, in their memorial, alleged that they had dismissed him for conduct which, they stated, warranted removal. This the town clerk denied. The Lords of the Treasury, without hearing the parties further than by taking the memorials into consideration, awarded that the town clerk was entitled to no compensation; stating as their reason, that they thought the council had made the removal in the *bonâ fide* and justifiable exercise of the discretion vested in them. On application for a *mandamus* to the Lords, commanding them to hear the appeal, Held, that it could not be granted; for that, if the Lords had jurisdiction (and *semble*, that they had not), they had already heard and decided. Although the Court considered that the dismissal was not warranted by the town clerk's conduct.

CRESSWELL obtained a rule, in *Michaelmas* term, 1837, calling upon the Lords Commissioners of Her Majesty's Treasury to shew cause why a *mandamus* should not issue, commanding them to hear and determine the merits of the appeal of *James Tibbits*, on his claim to be allowed compensation for the loss of the office of town clerk of the borough of *Warwick*: notice to be given to the solicitor for the Treasury, and the mayor and town clerk of the borough of *Warwick*.

The affidavit of *Tibbits* contained the following statements. On 7th May 1827, he was appointed town clerk (a), and he so continued until and at the passing of the Municipal Corporation Act, 5 & 6 W. 4. c. 76.

(a) The affidavit also contained a statement of a claim for compensation made by *Tibbits* in respect of the offices of clerk of the peace and clerk to the justices, as to which the Lords of the Treasury awarded a gratuity; but, as the argument and judgment related exclusively to the office of town clerk, so much only as relates to that office is stated in the text.

Under

Under the provisions of that act, he ceased to hold the office on 31st *December* 1835. On 1st *January* 1836, he was re-appointed town clerk by the new town council. On 6th *October* 1836, he was removed by them from the office. Shortly after the act passed, a minute was made and promulgated by the Lords of the Treasury, dated 10th *September* 1835, and headed, "Compensation to Town Clerks," which referred to stat. 11 G. 4. & 1 W. 4. c. 58., and concluded as follows (a).

"My Lords consider that the principle adopted by the legislature in the fore-cited act may fairly be applied

(a) The minute began thus. "My Lords read the 66th clause of the act for the reform of municipal corporations, by which compensation is provided for all corporate officers whose office shall be abolished, or who shall be removed from office under the provisions of the act, or who shall not be reappointed as aforesaid; and in certain cases an appeal is given to the Lords of the Treasury, who shall make such order as may appear to them just, which order shall be binding on all parties.

"Lord Melbourne and the Chancellor of the Exchequer inform the board that in the discussions which took place in parliament on this clause, it was stated by them that in fixing the amount of compensation it would be right and equitable to take into consideration, not only the salary and just emoluments of the office of town clerk, but also the profits derived from the performance of legal business of the several corporations executed by town clerks in their official capacity, and the just emoluments of any other corporate appointment held by such town clerk, and usually held in conjunction with, or attached or annexed to, the office of town clerk. My Lords concur in the views expressed by Lord Melbourne and the Chancellor of the Exchequer, and are pleased that their opinion should be recorded for the future guidance of the decisions on such cases as may be referred to them under the act.

"My Lords proceed to consider the principles upon which compensation should be awarded. My Lords read the act, 1 W. 4. c. 58., by which the legislature have secured compensation to officers in the courts of law upon abolition of office.

"My Lords read the fourth reason of the House of Commons for dissenting to the amendment of the Lords proposing to continue the existing town clerks for life, in which reason it is stated that a just and liberal construction cannot fail to be given to the compensation clause proposed by the House of Commons. My Lords consider "&c. (as above).

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to the cases of the town clerks, and they are of opinion that in all cases where such officer holds his office for life, or where the usage has been such as to raise a just expectation that the office should continue for the life of the holder, a compensation of not less than two thirds of his profits may be granted to such officer, estimated upon the principles stated in the commencement of the minute, and calculated upon an average of his annual emoluments for the five years previously to the 1st January, 1835."

About 1st January 1837, *Tibbitts* delivered to the new town clerk and the treasurer of the borough a statement of his claim for compensation, in which he alleged that the appointment of town clerk had been always considered in the borough as an appointment for life, and gave an estimate of his annual emoluments upon an average of the last five years, claiming in respect thereof 1200*l*. On 22^d February 1837, he received notice from the then town clerk, stating that the council had wholly disallowed his claim, and inclosing a report of a committee appointed by them for considering it, wherein they stated "that the office of town clerk in *Warwick* was held during the pleasure of the recorder; and the committee do not find that the usage has been such as to raise a just expectation that Mr *James Tibbitts* should hold that office during his life; they therefore, on these grounds (without referring to the various other objections to the claim), do not consider that he is entitled to claim or receive any compensation out of the borough fund by reason of his removal from that office."

In March 1837 he appealed to the Lords of the Treasury by a memorial, in which he stated the above fact

facts, and mentioned that he had been removed by the **council** in consequence of some disputes having arisen **between** the council and himself relative to the trans-**action** of the legal business of the corporation, which **had** been placed in the hands of another solicitor while **he** continued in the office of town clerk. He then sub-**mitted**, in his memorial, that he ought to have been **considered** as holding for life, or, at all events, under **such** circumstances as to raise a just expectation that he should be continued in his office for life; and he set out a clause of the governing charter (5 *W. & M.*), by which it was provided that the town clerk should be appointed by the recorder, and continue in his office so long as it should please the recorder: and he referred to the usage of the borough, as shewing a general practice of the town clerk holding for life. He added that he was willing to meet any charges of misconduct; and prayed that he might be heard before their Lordships by himself, his counsel, agents, or witnesses, in support of his claims, in case of further opposition thereto. About 14th *July* 1837, he received from the Lords of the Treasury a copy of a memorial of the corporation in answer to his statement, with an intimation that it was sent to him in order that he might make any observation in reply. The memorial of the corporation stated that the usage **had** never been to consider the office as one for the life of the holder; and mentioned that one of *Tibbitts's* predecessors had been dismissed from his office by a late recorder. Other facts were added as to the usage. The corporation further contended, in their memorial, that *Tibbitts* had forfeited all claim to compensation, by reason of improper conduct towards the corporation, the facts respecting which they then stated;

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adding that they had therefore dismissed him from his office, and that they were ready to prove the truth of their statement in any manner which the Lords should think necessary. *Tibbits* transmitted a memorial to the Lords of the treasury in answer, denying or explaining the allegations in the statement of the corporation, but admitting the fact of the dismissal of a previous town clerk by the recorder; and contending that (as he was legally advised) he was entitled to be employed in the legal business of the corporation.

About 28th *December* 1837, he received a Treasury minute, dated 15th *September* 1837, of which the following are extracts.

“The legal tenure of the office was during the pleasure of the recorder, who held his office for life. Mr. *Tibbits* contends that, though the tenure was nominally during the pleasure of the recorder, the usage was such as to raise a just expectation that he should hold the office for life. My Lords refer to Mr. *Tibbits's* own statement, in which they observe, that it is admitted by him that, in 1798, Mr. *Thomas Greenway*, the common clerk, was, in consequence of a dispute with the late Earl of *Warwick* (a), dismissed from his office. My Lords cannot admit that, with the recent instance before them, they should be justified in declaring that the immemorial usage had been such as to raise a just expectation that the office would continue for life, or during good behaviour. They do not, therefore, judge Mr. *Tibbits* entitled to the benefit of their minute of 1835, but are of opinion that he should be dealt with in the same manner as if he held an office during pleasure in the public service, and retired upon aboli-

(a) The then recorder.

tion or reduction of office, which course my Lords have pursued in similar cases (a)." * * *

"It remains for my Lords to decide upon the claim for the loss of the office of town clerk, to which Mr. *Tibbits* was elected by the town council, from which he was removed on the allegation of misconduct. The object of the act, in giving the privilege of granting compensation in such cases, was clearly to prevent the claims for compensation being defeated under colour of a re-election and subsequent removal; but it was never the intention of the legislature to interfere with the just authority of the town council over their town clerk, or to deprive them of the fair claims which they possess to the zealous and faithful services of their legal adviser and agent. Had my Lords any reason to suppose, from the papers before them, that Mr. *Tibbits* was re-elected for the object of defeating his claim for compensation, and of removing him upon any pretext or excuse which might subsequently appear, and not with the bonâ fide intent of continuing him in office so long as he should conduct himself to the satisfaction of the town council, my Lords would have felt themselves bound to have awarded him the same compensation as if he had been originally removed from his office. Upon an attentive consideration of the papers, my Lords can find no ground to impute such a course to the town council, or to adjudge that the removal of Mr. *Tibbits* was not made in the bonâ fide and justifiable exercise of the discretion vested in them. In this view of the case, my Lords are decidedly of opinion that Mr. *Tibbits* is not

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(a) It appeared from the minute that, in these cases, the Lords were in the habit of awarding a compensation as a gratuity, in proportion to length of service.

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entitled to compensation for his removal from the office of town clerk." Their Lordships then ordered that no such compensation should be awarded.

Tibbits further stated, in his affidavit, that his prayer to be heard before the Lords had not been complied with, and that, as far as he was informed, their decision was made without any further investigation than as appears by the documents above mentioned. In last *Hilary* term (*a*),

Sir *J. Campbell*, Attorney General, Sir *F. Pollock*, and *Wightman*, shewed cause on behalf of the Lords of the Treasury, and Sir *W. W. Follett* and *Waddington* on behalf of the corporation (*b*). The Lords of the Treasury have in fact heard this application, and would so return, if the mandamus were to go. Whether they decided correctly or not, is a question which cannot now be discussed; this Court will not hear an appeal from the decision, even upon a pure question of law: *In the Matter of Pratt* (*c*). In *Rex v. The Mayor, &c., of Bridgewater* (*d*) this Court interfered; but there they enforced a decision of the Lords of the Treasury. The Court there seemed to consider that the decision of the Lords, if without jurisdiction, might be a mere nullity, and so not to be enforced by this Court: and in *Regina v. The Corporation of Poole* (*e*) the Court refused to enforce their decision, conceiving the case not

(*a*) January 12th, 1839. Before Lord Denman C. J., *Littledale*, *Williams*, and *Coleridge* Js.

(*b*) *Cresswell* objected to counsel being heard on behalf of the corporation, although the rule directed notice to be given to them; but Lord Denman C. J. said that, according to the practice in such a case, the corporation were entitled to be heard.

(*c*) 7 A. & E. 27. (*d*) 6 A. & E. 339. (*e*) 7 A. & E. 730.

to be within the statute, and that the Lords, therefore, had no jurisdiction. Here, the assumption on the other side is that they have jurisdiction; otherwise the mandamus could not go. Besides, under the circumstances, the compensation could be merely nominal: the Court therefore will not grant the writ; *Ex parte Lee (a)*.

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Cresswell and *G. Hayes*, contra. It is certainly true that this Court will not enforce an order of the Lords of the Treasury where the statute gives no jurisdiction, because the Lords cannot give themselves jurisdiction. It seems to follow that they cannot divest themselves of jurisdiction: and therefore this Court, when the Lords refuse to hear a case within the statute, will compel the hearing: *Rex v. The Justices of Kent (b)*, *Rex v. The Justices of the City of York (c)*, shew the power exercised by this Court in such cases. In this case there has been no hearing. It is not necessary to contend that the applicant had a right to appear by counsel or agent: but, after the respective statements were before the Lords of the Treasury, the parties should have been heard; and a decision given without such hearing is a nullity. Mr. *Tibbits* applied, in his first memorial, to be heard by himself, or his counsel, or agent. This was the more necessary, because from *Ex parte Lee (d)* it appears that the Lords of the Treasury are not aware that an office held during good behaviour is an office for life. Here they appear to assume that a bonâ fide removal is sufficient to destroy a claim for compensation; but the legislature meant to provide, not merely against removals malâ

(a) 7 A. & E. 139.

(b) 14 East, 395.

(c) 1 A. & E. 828.

(d) 7 A. & E. 139. See p. 141.

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fide, but against removals, generally, which might be made under circumstances not justifying dismissal from an office held during good behaviour. Such removal, though made bonâ fide, may be unjustifiable. The proviso in sect. 66 of stat. 5 & 6 W. 4. c. 76. is, "That every such officer who shall be continued in or re-appointed to such office under the provisions of this act, and who shall be subsequently removed from such office for any cause other than such misconduct as would warrant removal from any office held during good behaviour, shall be entitled to compensation in like manner as if he had been forthwith removed under the provisions of this act, and had not been continued in or re-appointed to such office." This refusal appears, by the statement of the Lords of the Treasury, to have proceeded on wrong principle.

Cur. adv. vult.

Lord DENMAN C. J., in the present term (June 3d) delivered the judgment of the Court.

This was an application for a mandamus to hear and decide the appeal of the late town clerk of the borough of Warwick against the refusal of the council to allow him any compensation for the loss of his office. It arises under the sixty-sixth section of the Municipal Reform Act, which requires the town council to make compensation to all whose offices may be abolished, or who may be removed from them under the provisions of that act, with a proviso, that every such officer who shall be so removed for any cause, other than such misconduct as would warrant removal from any office held during good behaviour, shall be entitled to compensation in like manner as if he had been removed forthwith

forthwith under the provisions of that act, and had not been continued in or reappointed to his office.

The facts of the present case are these: that the town clerk was continued in his office for some time after the act passed; but the corporation, being involved in some proceedings in chancery respecting the management of a charity, were dissatisfied with his conduct in some particulars connected with it. He had refused to part with some documents, placed by the terms of the trust under his care, for the purpose of being carried to the solicitor in *London*; and had insisted on keeping the key of the chest in which they were lodged. These circumstances produced some degree of inconvenience, and some angry feelings; and he was removed from his office by a vote of the council, who refused him all compensation. On his appealing to the Treasury, their Lordships were of opinion that the removal was justifiable, and confirmed the order of the council, observing to the effect that, though officers were not to be removed without reasonable cause, yet in this case they thought the council had just ground for dissatisfaction in the town clerk's conduct, and were therefore not bound to make compensation to him on his removal.

In the Treasury minute issued on the present occasion, their Lordships very candidly disclose the reasons for their decision, observing that the proviso was meant to protect the officers from fraudulent amotion, but that the town council of *Warwick* could not be charged with any improper motive, as the dissatisfaction appears to their Lordships to be genuine and well founded. But, in answer to this, it must be said that the protection against fraudulent amotion is specific, and is referred to
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a precise test, — whether the amotion would have been warranted by the officer's misconduct.

The town clerk urges that he has been guilty of no such misconduct. We think him in this clearly right; and the contrary proposition was not contended for at the bar. But the cause shewn against the rule was, that the proceeding asked for was already complete, as the Lords of the Treasury had heard and decided the complaint; which is certainly true: so that, if they have jurisdiction over the subject-matter, as the application for the rule supposes, they have actually pronounced judgment which cannot be questioned.

The Court, however, conceived a strong doubt whether this jurisdiction is entrusted by the act to the Lords of the Treasury. An appeal to them is indeed given from the decision of the town council; but the proviso comes after, giving full compensation to such as may be removed without such misconduct as would warrant dismissal, not such as their Lordships may think would have warranted dismissal. No power is conferred by the act on the Lords of the Treasury, for ascertaining the facts which may be thought to prove such misconduct; nor is there any disrespect to their Lordships in supposing that they may not be cognisant of the law (often difficult of application) on which the question might turn.

These considerations appear to prove that the Lords of the Treasury have no power to decide the question whether the town clerk has or has not been properly removed from his office. If they have it not, the mandamus prayed for cannot issue, for that reason. If they possess the jurisdiction, the answer, that they have already

already exercised it, is equally conclusive against making the rule absolute.

Whether there may be another remedy it is no part of our duty to decide at present.

Rule discharged (a).

(a) The QUEEN *against* The Lords Commissioners of Her Majesty's Treasury.

(In the Matter of TREVOR.)

A rule for a similar mandamus had been obtained in *Michaelmas* term, 1837, by Sir *W. W. Follett*, on behalf of *John Trevor*, late town clerk of *Bridgewater*. In last *Easter* term (*April* 16th, before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.), Sir *John Campbell*, Attorney General, Sir *F. Pollock*, and *Wightman* shewed cause, and *Jervis* and *Jardine* supported the rule. The following cases were referred to: *Harcourt v. Fox* (4 *Mod.* 167.), *Rex v. Owen* (4 *Mod.* 293.), *Bagg's Case* (11 *Rep.* 93 b.), *Rex v. The Mayor and Aldermen of London* (3 *B. & Ad.* 255.), *Ex parte Smyth* (3 *A. & E.* 719.), *Kent v. Elstob* (3 *East*, 13.).

Cur. adv. vult.

Lord DENMAN C. J., after delivering the judgment in the text, added, — In another case, moved on the part of the town clerk of *Bridgewater*, the same judgment must be given; the only difference in the two cases lying in the particulars of conduct which have been thought to justify his dismissal, but, in our opinion, certainly do not, within the terms and meaning of the proviso.

Rule discharged.

See the next cases, p. 386.

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The following cases may properly be added here.

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The QUEEN *against* The Corporation of
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The QUEEN *against* The Mayor, Aldermen,
and Burgesses of the Borough of NEWBURY.

Where a party removed from a borough office under stat. 5 & 6 W. 4. c. 76., re-appointed, and afterwards dismissed, applies to the town council for compensation, which is refused, and he thereupon appeals to the Lords of the Treasury under sect. 66 of the statute, the Lords have no jurisdiction to enquire whether he was or was not removed for a sufficient cause within that section.

And therefore, where the council had refused compensation, and the Lords, on appeal under sect. 66, and on inquiry into the facts leading to the dismissal, confirmed such refusal, this Court, on affidavits satisfactory to them, granted a mandamus calling on the corporation to assess compensation, notwithstanding the judgment of the Lords.

AFTER the above decision in *The Queen v. The Lords of the Treasury*, a rule was obtained on behalf of Mr. Tibbits, in the same (*Trinity*) term, for a mandamus to the corporation to assess compensation to him for the loss of his office of town clerk. The affidavit in support of this rule set forth the same grounds of application as those urged in support of the former motion; alleged reasons for which Mr. Tibbits believed that he should have held his office till death or resignation, but for the passing of stat. 5 & 6 W. 4. c. 76.; and mentioned the prior application against the Lords of the Treasury, and its unsuccessful result, stating, as the ground of rejection, "that the deponent was not legally entitled to any compensation under the said statute." The affidavits in answer went into the merits of the case as to the grounds of dismissal, and the alleged tenure of office, and stated that the Lords, on a full statement of facts, had decided against Mr. Tibbits as to the tenure and reasonable expectation of continuance in the office.

In the case of *The Queen v. The Mayor, &c., of the Borough of Newbury*, a rule had been obtained, on be-

half

half of *Robert Baker* (in *Trinity* term, 1839), for a **man-**
damus commanding the mayor, &c., to prepare, execute,
and deliver to him a bond, securing to him an annuity of
107*l.*, in compensation for the loss of his office of town
clerk of the said borough. He stated in his affidavit that
he was town clerk when stat. 5 & 6 *W. 4. c. 76.* passed,
was reappointed in *August* 1836, and was dismissed, by
resolution of the town council, in *January* 1838. He
denied that such dismissal was merited, or that he had
been guilty of such misconduct as would warrant his
removal from the said office or any office held during
good behaviour; and he stated his belief (alleging cir-
cumstances as to the tenure in former times) that, but
for the passing of the act, he would have continued to
hold the office during life. He then deposed that, in
March 1838, he laid before the town council a claim
of compensation, which they disallowed; whereupon he
presented a memorial of appeal to the Lords of the
Treasury, setting forth the material circumstances of
the case. The Lords transmitted the memorial to the
mayor, to be laid before the town council for any ob-
serva-tion upon or answer to it which they might think
fit to submit; and the town council presented a reply
to the memorial, in which they stated at length the
reasons for their determination on *Mr. Baker's* claim,
and contended that he was not entitled to compen-
sation under the sixty-sixth section of the act. The
Lords transmitted this statement to *Mr. Baker* for
any observations which he might think fit to make;
and he presented a memorial in answer. The Lords,
by minute of *January* 23d, 1839, made (as was
therein stated) after having "read all the papers in
the appeal," and "upon a full consideration of all the
 Vol. X. D d papers,"

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papers," pronounced Mr. *Baker* entitled to compensation; awarded him an annuity of 107*l.* for life; and directed that an order should be prepared, and sent, with that minute, to the mayor. The affidavit stated that this was done, but no step taken by the town council for granting the annuity.

The affidavits in answer controverted Mr. *Baker's* statements as to the tenure of the office, and alleged further that he had been dismissed (after due examination and hearing) for misconduct, which they shortly specified, and which, in the opinion of the town council, would warrant removal from any office held during good behaviour: and that the facts in these affidavits above mentioned, and all the material circumstances of the dismissal, were stated by the town council to the Lords of the Treasury, in answer to Mr. *Baker's* memorial, and while the same was under their consideration. The affidavits then set forth more fully the circumstances of the alleged misconduct, and of Mr. *Baker's* dismissal, and averred that the town council delivered to the Lords a statement under their common seal, alleging the principal facts above set forth, and examining the details of Mr. *Baker's* claim for compensation; but such examination was declared to be without prejudice to the position that his conduct warranted his removal without compensation. The deponents also stated that they were advised and believed that the misconduct stated by them warranted removal from any office held during good behaviour.

This case coming on for argument before that of *The Queen v. The Corporation of Warwick*, and raising the same point as to the jurisdiction of the Lords of the Treasury, the Court desired to hear the latter case also.

before giving any judgment; and they were argued in immediate succession (a).

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Sir *W. W. Follett* and *J. L. Adolphus* against the rule in *The Queen v. The Mayor, &c., of Newbury*. The adjudication of the Lords of the Treasury is ineffectual for want of jurisdiction. By stat. 5 & 6 *W. 4. c. 76* i. 66. every officer of a borough "who shall be in any office of profit at the time of the passing of this act, whose office shall be abolished, or who shall be removed" under the act, or shall not be re-appointed, and every such officer re-appointed under this act who shall be subsequently removed "for any cause other than such misconduct as would warrant removal from any office held during good behaviour," is declared entitled to compensation, which is to be assessed by the council and paid out of the borough fund. The same section enacts that every person "entitled to such compensation" shall deliver a statement as to his past emoluments, &c., and setting forth the sum claimed by him, which statement shall be taken into consideration and determined upon by the council; and, if the claimant "shall think himself aggrieved by the determination of the council thereon, or in case one third of the members of the council shall subscribe a protest against the amount of compensation allowed by the determination of the council as excessive," the claimant, or any member of the council so subscribing, may appeal to the Lords of the Treasury, "who shall thereupon make such order as to them shall seem just;" and such order, signed &c., "shall be binding on all parties." By this clause it is an essential preliminary to the claim, that

(a) *January 29th and 30th. Before Lord Denman C. J., Littledale, Williams, and Coleridge Js.*

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the party shall have held office under the circumstances pointed out by the act, and have been removed (or not re-appointed), under the act; or that, if re-appointed, he shall have been removed for such cause as the section defines. These are facts necessary to give the claimant a locus standi before the council. If they are unquestioned, and the council adjudicate upon the claim, but make an unsatisfactory award as to the amount, an appeal clearly lies to the Lords of the Treasury. But, if these preliminary facts, or the legal inference from them, as he suggests it, be denied, and the council for that reason refuse to award any compensation, the claimant ought not to appeal to the Lords of the Treasury, nor can they enquire into the matter in dispute. He must move this Court for a mandamus to the council to hear his claim and award compensation; if they still contest the facts upon which he grounds his right of claim, the Court, if it sees cause, will grant the writ, and, on a return, the facts may be tried in due course of law. Then, if a peremptory mandamus issue, the council must determine the amount of compensation; and upon that point the claimant, if dissatisfied, may appeal to the Lords of the Treasury. But, if, when the council refuse to entertain his claim, he appeals, in the first instance, to the Lords upon the disputed question of fact or law, he submits matter to them which they have no power to try. The Lord Treasurer, whom they represent, had no such judicial authority; 4 *Inst.* c. 11; and they can have none but that which the statute gives them. The statute furnishes them with no means of enquiring into disputed facts; they cannot administer an oath, or compel the attendance of witnesses: and on points of law they have no legal assessor; nor is there any court of appeal to rectify their judgments if they
mistake

mistake the law: yet, if they could determine the preliminary questions which arise as to the right of making a claim, they would often have to decide very important questions both of law and of fact. The statute, in reality, makes them mere valuers. When the party "*entitled to such compensation*" has had his statement received and considered by the council, the Lords of the Treasury are, in case of appeal, made arbitrators upon the question of amount. Their mode of trying, by memorials and counter-memorials, is suited to this kind of investigation, but not to inquiries of a more difficult kind, as on questions of misconduct. The appeal is given in case the claimant thinks himself aggrieved by the determination, or if one third of the council protest against the amount of compensation as excessive. There is no reason that the enquiry should be limited to amount in the one case more than in the other; the wording of this clause is an additional proof that the same limit was contemplated in both instances. It may be contended that the council are, by sect. 66, to assess compensation with "regard" to "all" the "circumstances of the case," and that the Lords must assess upon the same principle; but the "circumstances," on the enquiry before them, can only be those bearing on the question of amount. Here the lords have made their award upon statements raising the whole question of misfeasance in office; their adjudication, therefore, is grounded on an excess of jurisdiction.

In the late case of *Regina v. The Lords of the Treasury, In the Matter of Tibbits (a)*, this Court expressed at least a doubt as to the jurisdiction of the Lords to decide whether or not a town clerk had been properly removed. In *Rex v. The Mayor, &c., of Bridgewater (b)*, where the

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(a) *Ante*, p. 374.

(b) 6 A. & E. 339.

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Lords, on appeal, had awarded compensation, as for a corporation office, Lord *Denman* C. J. and *Coleridge* J. intimated that, if it had appeared not to be a borough office, the Court would not have enforced the decision, and that the Lords could not, by their own order, give themselves jurisdiction. If they had jurisdiction, their order, by sect. 66, was "binding on all parties." In *Regina v. The Corporation of Poole* (a) the Lords had, on appeal, awarded compensation for dismissal from an office: but this Court held that the party was not dismissed by virtue of the Municipal Corporation act, and therefore refused to enforce the award by mandamus: and Lord *Denman* C. J. said, "We were desirous of considering whether, upon the affidavits, he was an officer of the borough of *Poole*, and had been removed from his office under the provisions of the act. If we should be satisfied that the affirmative of both these propositions was established, we had no doubt that the Lords of the Treasury had the exclusive jurisdiction to determine on his right to compensation; and it would then be our duty to enforce by mandamus obedience to the award they have made; but, if either of those propositions be decided in the negative, it would be equally clear that their Lordships have not, and of course cannot give themselves, jurisdiction." It is unnecessary here to discuss the facts; for it is sufficient that the council have dismissed Mr. *Baker's* claim on account of an objection to his right of appearing as a claimant; namely, that he was removed from office on a bonâ fide charge of misconduct. Had the charge been made colourably, to preclude the claim, a different question would have arisen; but that is not pretended.

(a) 7 A. & E. 730.

Sir

Sir *J. Campbell*, Attorney General, and *Whateley*, in support of the rule; and Sir *J. Campbell*, Attorney General, and *Waddington*, in opposition to the rule in *The Queen v. The Corporation of Warwick*. If the Lords of the Treasury had not jurisdiction, their award, of course, cannot stand. But it is clear that they have jurisdiction over the claim of an officer dismissed and not re-appointed; and there is no distinction between that and the claim of a person re-appointed and dismissed without proper cause. It is contended on the other side that, on appeal, the act makes them merely advisers; but sect. 66 directs that the town council, in assessing compensation to an officer not re-appointed, is to consider "the manner of his appointment to the said office, and his term or interest therein, and all other circumstances of the case;" and, when the claimant appeals, the whole matter, as it came before the council, by sect. 66, referred to the Lords of the Treasury. Here members of the council protest, the Lords are expressly limited in their enquiry to the question of amount; but, where the claimant appeals, there is no such restriction: the council are first to decide upon the right of claim and the quantum; and, "in case the person referring such claim shall think himself aggrieved by the determination of the council thereon," he may appeal to the Lords of the Treasury, "who shall thereupon make such order as to them shall seem just." It is contended that the Lords of the Treasury cannot decide a disputed question on the right, because they have no authority to administer an oath: but they can decide upon the evidence taken before the council. Here the town council of *Newbury* submitted themselves to the judgment of the Lords upon the evidence. If, indeed, the

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supposed office for which the Lords grant compensation prove not to be an office within the act, their award must necessarily be a nullity; and that was the case in *Regina v. The Corporation of Poole* (a): but no such point arises here. In *Ex parte Lee* (b) it was made a question whether the Lords had jurisdiction where the council had entirely refused to grant compensation under all the circumstances of the case; and this Court did not deny that they had such jurisdiction. But in such a case, if the Lords could decide at all, the whole matter must go before them. This Court will not enter into questions of nicety on the jurisdiction of the Lords Commissioners in cases of compensation. They are appointed by the statute as a temporary tribunal to administer rough justice (under the control of this Court) in particular class of cases, the legislature placing this confidence in them with a view that they should act liberally, and take care that persons really aggrieved should obtain the compensation due to them.

Cresswell and *G. Hayes* in support of the rule in *The Queen v. The Corporation of Warwick*. *Ex parte Lee* (b), if it decided any thing applicable to the present case, would shew that the town council cannot absolutely refuse compensation, nor the Lords of the Treasury confirm such refusal on appeal. *Regina v. The Corporation of Poole* (a) is, in principle, decisive of this case. If the Lords of the Treasury there could not decide conclusively that the claimant was removed from his office under circumstances entitling him to compensation within the statute, neither can they conclusively decide

(a) 7 A. & E. 730.

(b) 7 A. & E. 139.

that point here. This Court is, by virtue of its ordinary jurisdiction, the proper tribunal for determining the party's right to be a claimant; and that jurisdiction could be taken away only by express statutory enactment. It is argued that, although the Lords cannot examine witnesses, they may act upon the evidence taken by the town council; but, where an individual is the appellant, he might justly complain that this was trying the case on evidence taken by the adverse party. And the council have no power, by sect. 66, to examine any one on oath but the claimant himself.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court in *The Queen v. The Corporation of Warwick*.

The late town clerk, having been removed from his office, appealed to the Lords of the Treasury, complaining that the removal was not justified by such misconduct as would have warranted his removal from an office held during good behaviour. Their Lordships, having considered the statements of both parties, dismissed the appeal, thinking that the council had acted bonâ fide, and that they had just ground for removing the officer. The supposed misconduct was laid before us by affidavit, and appeared to us then, as it does now, not to be such as would have warranted removal from an office held during good behaviour. If, however, the Lords of the Treasury had jurisdiction to try that question, all the world is bound by their decision, though we may deem it erroneous. But a mandamus to them to hear and decide was refused, because they either had no jurisdiction or had already exercised it. The same gentleman has now obtained a rule for a mandamus to the

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the council to assess compensation for the loss of his office, on the ground that his removal was unwarrantable under the proviso above alluded to. The cause now shewn against that rule is the before-mentioned decision of the Lords of the Treasury on his appeal, and brings directly before us the question of their jurisdiction in this matter.

The effective words of the sixty-sixth clause are, that every officer of a borough who shall be in any office of profit at the time of the passing of this act, who shall be removed from his office under the provisions of this act, shall be entitled to have an adequate compensation, to be assessed by the council, for the salary, fees, and emoluments of the office, regard being had to the manner of his appointment, and his term or interest in the office, and all other circumstances of the case: the person entitled shall deliver in a statement of the amount received by him for the last five years, and the council shall consider and determine thereon; and, if he think himself aggrieved by their determination, it shall be lawful for him to appeal to the Lords of the Treasury, who shall thereupon make such order as to them shall seem just, which shall be conclusive and binding: Provided (among other things) that every such officer who shall be continued in office and subsequently removed "for any cause other than such misconduct as would warrant removal from any office held during good behaviour, shall be entitled to compensation in like manner as if he had been forthwith removed under the provisions of this act," and not continued or re-appointed.

If, now, this town clerk had been forthwith removed, he would have been entitled to an adequate compensation for the emoluments of his office, regard being had

to

o the nature of his appointment, his term in the office, and all other circumstances of the case, with a power of appealing, if dissatisfied with the determination of the council, to the Lords of the Treasury.

Must they, the Lords, then, have the right to consider the causes of removal, and decide on their sufficiency? If so, it must be from being empowered to look at them in all the circumstances of the case: but the circumstances are only referred to them as qualifying the amount of compensation, while, if the removal were justifiable, no compensation could be due. Or must not the facts be such as to shew that the removal was not for misconduct, to ground their jurisdiction? We think the latter. The words of the proviso control the whole clause: if the council removed without a case of misconduct, they must give compensation. Whether that misconduct existed, must be determined by some superior authority. But, if that authority was the Treasury, it is incredible that no power is given to their Lordships to inquire into the facts; nor can they be expected to possess the legal knowledge requisite for deciding what misconduct would have justified the officer's removal. On the contrary, all the words of the section are employed in creating a power to revise the assessment of the compensation, in like manner as if the party had been removed by the Municipal Reform Act, or immediately after its passing.

We think the town council could not deprive their officer of his right to compensation by removing him without cause; that the Lords of the Treasury had no authority to exclude him from compensation by their affirmation of what was done; and that he is entitled in the same manner as he would have been if removed by the act itself.

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The rule for a mandamus must, therefore, be absolute; or, if the council think their dismissal justified by the misconduct of the town clerk, that must be returned as an answer to the writ.

Rule absolute.

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In *The Queen v. The Mayor &c. of Newbury, The Court*, in *Easter term (May 2d)*, 1840, desired to have the facts returned, and made the rule absolute.

The QUEEN *against* CAPEL HANBURY LEIG
Esquire, and Others.

A land-owner may be liable, by prescription, to repair sea-walls, though destroyed by extraordinary tempest. And therefore, on presentment against such owner, for suffering the walls to be out of repair, it ought not, in point of law, to be left as the sole question for the jury, whether the walls were in a condition to resist ordinary weather and tides: but it is a question, to be determined on the evidence, whether the proprietor was bound to provide against the effects of ordinary tempests only, or of extraordinary ones also.

Orders of the commissioners of sewers, requiring land owners to repair and alter sea wall may be given in evidence as adjudications by a court of competent jurisdiction, without proof of their having been acted upon. After a considerable lapse of time (as seventy years), the Court will presume that such orders were executed.

PRESENTMENT at a general court and session of sewers for the Levels of the hundreds of *Caldicot* and *Wentlooge*, in *Monmouthshire*. The presentment charged that the defendants, and all those whose estates they have of and in certain lands and tenements commonly called the Lordship of *Porton*, situate within the parish of *Goldclift*, in the county of *Monmouth*, within the level of the hundred of *Caldicot*, and within the jurisdiction of this Court (part of which said lands abut part upon part of the wall hereinafter mentioned), from time whereof &c., by reason of their tenure of the said lands &c., have been forced to repair, and of right ought to have repaired, and still of right ought &c. divers parts of a certain wall called *Porton Wall*, adjoining to a certain public navigable river called the *Severn*

and

and within the said parish &c., and within the level and jurisdiction aforesaid, that is to say a certain part of the said wall &c. (stating the extent and local situation of the portions of wall), which said several parts of the said wall are within the parish &c., and within the level and jurisdiction aforesaid. Averment that, although defendants ought to have repaired and kept in repair the said several parts, they have wholly neglected so to do, and that, by and through the neglect and default of defendants in this behalf, and for want of the said several parts of the said wall being kept in due and sufficient repair, heretofore, towit on &c., divers large portions of the said wall, viz. (stating the length of the portions respectively), were ruinous, prostrate, &c., and yet remain and continue ruinous, prostrate, &c., down to the time of taking and finding this inquisition. And that defendants, by reason of their tenure of the said lands and premises, ought to repair, amend, and make good the said several breaches, defects, and injuries in the said several parts of the said wall. And the jurors further presented that the costs of repairing the said breaches, &c., would amount to 767*l*. The presentment was removed by certiorari into this Court, where the defendants pleaded Not Guilty.

On the trial of the issue, before *Bolland B.*, at the *Monmouthshire* Spring assizes, 1837, it appeared that the defendants were liable to repair *ratione tenuræ*, and that the wall had been thrown down by the sea on *October 11th*, 1836. The defendants insisted that in this instance they were not liable, inasmuch as the mischief had been done by an extraordinary tempest, which fact was proved. It appeared that the wall in question had been repaired by the lords of the land now charged, in

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1813 and 1815, after storms: the last time at an expense of more than 5000*l*. Some evidence was given as to the condition of the wall before the repairs done in 1813 and 1815 became necessary. There was no proof that before those times it had been presented as wanting repair.

The counsel for the Crown also tendered in evidence certain documents alleged to be presentments by sewers' juries touching defects and liabilities to repair within the levels in question; and minutes of orders purporting to be made by the commissioners of sewers within these levels at various periods during the last hundred years (among others, an order of 1761), for the repair or alteration of walls by parties mentioned in the minutes as liable. The presentments and orders were contained in books, produced by the clerk of the commissioners, who held them in that capacity. *Bolland B.* held the presentments inadmissible. As to the orders, he enquired if they had ever been acted upon. *Maule*, for the Crown, said that, in the case of old orders, that could not have been shewn, but that the orders themselves were acts; and that it lay on those who disputed their admissibility to shew that they had been disobeyed. *Bolland B.* held that the orders, not appearing to have been acted upon, or even to have come to the knowledge of the parties supposed to be affected by them, could not be read.

The learned Judge, in summing up, told the jury that the only question was, whether or not the wall, which the defendants were charged as liable to repair, was, at the time of the storm on *October 11th, 1836*, in such a state as to have resisted the ordinary pressure of the weather and tides upon the spot on which it was constructed; and he said that, if the prostration of the wall

wall was attributable to the storm, and not to any infirmity in the wall itself upon which the defendants would be liable, it would of course be the duty of the jury to acquit. His Lordship read to them the argument of *Gibbs and Dampier* in *Rex v. The Commissioners of Sewers for the Western Division of Somerset* (a), which he said was recognised as law by Lord *Kenyon* in the same case; and the judgment of *Abbott C. J.* in *Rex v. The Commissioners of Sewers for Essex* (b). And he again stated the only question to be, whether the wall fell by reason of any infirmity in it which the defendants were liable for as being an act of their own and an act of nuisance, or by reason of the extraordinary tempest on *October 11th*. The jury found the defendants Not Guilty.

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Maule, in the ensuing term, moved for a rule to shew cause why the verdict should not be set aside, and a new trial had, on the following grounds. First, the learned Judge was wrong in leaving it to the jury to say whether the wall at the time of the storm was fit to withstand ordinary bad weather, and intimating to them that a party liable by tenure is not bound to repair in case of extraordinary tempest. Obligation by tenure is in this respect like obligation by covenant. The doctrine sanctioned by the learned Judge derives some colour from the language of *Walmesley J.* in *Rooke's Case* (c); but in *Keighley's Case* (d) *Walmesley J.* "explained his opinion in *Rooke's Case* (c), that the commissioners ought not to charge him who is bound by prescription only: that he meant where there is no

(a) 8 T. R. 312.

(b) 1 B. & C. 477.

(c) 5 Rep. 99 b.

(d) 10 Rep. 139 a.

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default in him (for that agrees with the words of the said act of 23 H. 8.), and no inevitable necessity for insufficiency or otherwise; but if he himself can do it there he himself shall be only charged by force of the said commission: and he said, that his reason given in *Rooke's Case* (a) implied as much, *sc.* for otherwise it may be that all the country will be drowned; which reason imports his meaning, that all who had lands in danger should not be charged, but in case of insufficiency of him who is bound, or for other inevitable necessity." And *Callis*, in his *Reading on The Statute of Sewers*, p. 144., thus comments on the cases. "In *Rooke's Case* (a) it is said, 'that if one be bound in respect of his lands to repair a wall or bank by tenure, prescription, or otherwise, that yet the commissioners of sewers could not assess the said party alone to repair the same, and said that the commissioners were not tied to the rules of prescription, tenure, custom or otherwise, but ought to assess all the level to do the same, which are to have good thereby: ' but this being mistaken, is very justly and discreetly altered in the said case of *Keighley* (b) by the author himself; for how could it be presumed that the learned makers of the worthy law would have stricken down at one blow so many thousand prescriptions, customs, tenures, covenants, and uses, as be within this realm, which be tied and bound to do and make the repairs in this kind some in consideration of houses and land, others for yearly rents, and for other causes." And at p. 146. he cites a case from *Dyer* (c), "where one made a lease for years of grounds to J. S. lying near the river *Essex*

(a) 5 Rep. 99 b.

(b) 10 Rep. 139 a.

(c) *Anonymous, Dyer*, 88 a. pl. 10. †

and the lessee covenanted to sustain and repair the banks of the river to preserve the meadow from surrounder on pain of 10*l.*; yet after an extraordinary flood, the banks were broken down, and the meadows were surrounded, and it was there holden to be no breach of covenant." In the edition of 1685 there is added this note (which subsequent editions retain): "And that he should be excused from the penalty:" with, indeed, a qualification, — "but yet he must make and repair the banks in convenient time." In *Rex v. The Commissioners of Sewers for Somerset* (a), where the sea-wall had been thrown down by a violent storm, the commissioners made an order, charging all persons who held lands liable to damage by inundations of the sea for want of a sufficient wall, though certain individuals had been liable to repair the former wall *ratione tenuræ*; and it may be said that the validity of the order, as to the persons charged, was not disputed. But there the order was for building "a new wall of larger size and dimensions, and upon a different principle." The thing to be done, therefore, was not that which the individuals were bound by prescription to do. In *Rex v. The Commissioners of Sewers for the Western Division of Somerset* (b) it was argued and admitted that, if sea-walls be destroyed by an extraordinary tide, or by tempest, without any default in the party bound to repair them, the expense of repair must fall upon the level. But the point decided was that, in such a case, a rate necessarily imposed upon the level to prevent the overflow of the sea was not bad. And there it had become "absolutely necessary to raise new works of a different and more expensive construction." [Patteson J. According to your

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(a) 9 East, 109.

(b) 8 T. R. 312.

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view, there could be no case in which there was not default in the party liable, if the wall were prostrate.] If it was destroyed by an extraordinary tempest, he would, nevertheless, be bound to repair; but, on a presentment against him, he might shew, upon the plea of not guilty, that before the accident he had kept up a wall of the proper dimensions, and that he had taken steps for repairing as soon as possible afterwards. There is no authority shewing that, where a party is liable without qualification to repair *ratione tenuræ*, he can be excused on the ground here suggested. [Lord Denman C. J. mentioned *Rex v. The Commissioners of Sewers for Essex* (a). Secondly, the orders of the Court of Sewers calling on the lords of *Porton*, the defendants' predecessors, to repair (and no orders on any one else were tendered in evidence) ought not to have been rejected. It was urged that they were not admissible, because nothing appeared to have been done upon them; but, if they were obeyed, no evidence of that fact would appear, though, if they had been disobeyed, there might have been evidence to that effect. The order itself is a thing done by a court of competent authority; and the presumption is that it was obeyed. Thirdly, the presentments ought to have been received, notwithstanding the objections, which were that they appeared to be copies; that nothing appeared to have been done upon them; and that they were made by a standing jury, as to which *Rex v. The Commissioners of Sewers for Somerset* (b) was cited. (The argument on this head of objection is not followed up, a decision having been given upon the points. *Man* cited *Ex parte Taylor* (c).).

Cur adv. val.

(a) 1 B. & C. 477.

(b) 7 East, 71.

(c) 3 Y. & J. 91.

A ru

A rule nisi was granted (*April 25th*), against which

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Ludlow Serjt. and *R. V. Richards* shewed cause in last *Easter term* (a). As to the liability to repair, it is contended, on the other side, that, where a sea-wall is overthrown by extraordinary tempest, the commissioners of sewers may tax the level for the purpose of more expeditious repair, but the individual bound *ratione tenuræ* will be ultimately liable. That, however, is not so where the individual has been in no default. All the cases are explained by the words of the commission of sewers, stat. 23 *H. 8. c. 5.* sects. 2., &c., which, after reciting the mischiefs happening by the destruction of sea-walls, directs the commissioners to survey, &c., and as well to ordain and do according to the statutes, as also to inquire “through whose default the said hurts and damages have happened.” The question here was, whether the wall, just before the storm, was in such a state as placed the defendants out of default; and the learned Judge left it properly to the jury to say whether the wall was in sufficient repair on the 11th of *October* to resist ordinary weather and tides, and whether the damage happened by any default on his part. *Callis*, pp. 146, 147., the *Anonymous Case* in *Moore* (b), and *Griffin’s Case* (c), referred to in the note (ed. 1685) to *Callis*, p. 146., are strong authorities to shew that, if the damage happens by violent tempest, without default in the party bound by prescription, he is excused. The language of *Walmesley J.* in *Keighley’s Case* (d) also supports the proposition that, where there is no default in

(a) *April 30th.* Before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge J.*s.

(b) *Moore*, 62., pl. 173.

(c) *Dalison*, 70. *S. C. Moore*, 69. pl. 187., as *Griffith’s Case*.

(d) 10 *Rep.* 139 a.

CASES IN TRINITY TERM

the individual, the public, and not he, is liable. In *Rex v. The Commissioners of Sewers for the Western Division of Somerset* (a) that doctrine was enforced in the argument against the rule, and adopted by Lord Kenyon. In *Rex v. The Commissioners of Sewers for Essex* (b) Abbott C. J. says, "Even where an individual is bound by prescription or otherwise to repair, still if there be no default on his part, and damage is sustained by an extraordinary flood or tempest, the whole level must bear the loss and be contributory to the repairs." It is represented on the other side that, although the commissioners are bound, in such a case, to provide for the repair in the first instance, the individual is ultimately liable; but this is not borne out by the cases, or by the language of *Callis* in the passages which have been referred to. In *Rex v. Baker* (c), on the Oxford circuit, where an individual was charged with repairs, the whole question turned on the condition of the wall at the time when the damage by tempest happened. The direction to the jury, therefore, in the present case was right. The former orders of the commissioners of sewers were properly rejected, for the reasons which prevailed at the trial. But, further, the proceeding here is criminal, and therefore the Court will not order a new trial. This point was much discussed, and the Court would not decide on granting a new trial, in *Rex v. Sutton* (d). [Lord Denman C. J. We can hardly consider this as a criminal proceeding.] The defendant may suffer fine and imprisonment. [Lord Denman C. J. In a civil case he may be taken in execution.]

(a) 8 T. R. 312.

(c) Not reported. See the case at Gloucester, referred to by B. C. J. in *Henly v. The Mayor of Lyme*, 5 Bing. 113.

(d) 5 B. & Ad. 52.

(b) 1 B. & C. 477.

Talfourd Serjt. and *Whateley*, contra. The direction of the learned Judge led the jury to conclude that an individual could be liable to repair only in the case of an ordinary tempest. If there could be a larger liability, the Judge should have brought it within the jury's consideration. A larger may exist in point of law. The commissioners of sewers are to enquire by whose default damages happen; but the question is, also, by *what* default? Here some evidence of the more extensive obligation appeared; namely, the repairs done in 1813 and 1815. [*Coleridge* J. The wall may not have been in perfect repair before those periods (a).] It had not been presented as out of repair; the evidence shewed that it was not so in 1815, before the accident; and the repair then performed cost a sum which no person would lay out unless convinced that he was liable. *Keighley's Case* (b) does not shew that the liability now contended for may not exist. The form in which that case came under discussion is not stated: but it was before the Court of Common Pleas, and therefore the proceeding could not have been a *mandamus* or a presentment. Probably the question arose upon a rate. All that the case decides is that, on a sudden emergency, the commissioners may take measures for the present repair; not that the proprietor is not liable ultimately. And this is consistent with the illustrations there given by Lord *Coke*, who says (c) that "in the case at bar, the law is grounded upon great reason: for although by the law one be bound to keep and repair it" (the wall), "yet *impotentia excusat legem*, and that which comes by the act of God, and is so inevitable,

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(a) See *Anonymous*, *Moore*, 62. pl. 173. (b) 10 *Rep.* 139 a.
(c) 10 *Rep.* 139 .

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that by no providence or industry of him that is bound, it can be prevented, shall not charge him : and therefore if tenant for life or years does not repair a sea-wall, so that by his fault the land is drowned, and becomes unprofitable, it is waste ; but if the land is drowned by the extraordinary rage and violence of the sea without his fault, it is no waste ; no more than if a house is burnt by lightning, or overthrown by the rage of the wind or tempest, without fault in the lessee, it is no waste." Yet in such cases the tenant would not the less be liable to repair within a reasonable time afterwards. In *Com. Dig. Wast*, (E 5.), it is said that the action of waste "does not lie, if the waste was by tempest, lightning, &c. if it be repaired in convenient time ;" and *Keighley's Case* (a) is referred to. The dictum accords also with that in *Rooke's Case* (b). [*Littledale J. Comyns* also refers to *Co. Litt.* 53. a. In the following page (53. b.) Lord *Coke* says, "It is waste to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea, the meadow or marsh is surrounded, whereby the same becomes unprofitable ; but if it be surrounded suddenly by the rage or violence of the sea, occasioned by wind, tempest, or the like, without any default in the tenant, this is no waste punishable." There, the qualification is not added.] The tenant is exempted from any present penalty to which he might be liable, but is not excused from repairing in proper time. Any language in *Rex v. The Commissioners of Sewers for the Western Division of Somerset* (c), which may seem to support the argument for the defendants, was extra-judicial. The question there turned upon

(a) 10 Rep. 139 a.

(b) 5 Rep. 100 a.

(c) 8 T. R. 312.

the

the liability of the level to taxation in the first instance. Neither in that case nor in *Rex v. The Commissioners of Sewers for Essex* (a) was it considered whether in particular cases an individual may not be obliged to repair, although the mischief be done by sudden inundation and tempest. In the case of liability *ratione tenuræ* to repair bridges, a violent influx of water does not excuse the landowner. In many places, and particularly that now in question, it might be very difficult to decide, on evidence, what could be considered the ordinary and what the extraordinary operation of the elements.

As to the rejection of evidence: the presentments were admissible on the principle, laid down in 1 *Stark. on Ev.* 260. (ed. 2.), under the head "Inquisitions," that the subject matter is of public concern, and no one can properly be considered a stranger to it. The orders were admissible on similar grounds. They were not shewn to have been acted upon; but they were themselves an act done: and they were in the nature of evidence of reputation, and therefore admissible, like the verdict (on which no subsequent proceeding had been grounded) in *Brisco v. Lomax* (b). At any rate, they were evidence against the lords of *Porton*.

Cur. adv. vult.

LORD DENMAN C. J. in this term, May 27th, delivered the judgment of the Court.

In this case the defendants were charged, by reason of their tenure, with the repair of a sea-bank. The defence was, that the wall was in a state of repair sufficient to resist the ordinary action of tides and weather, and that the damage was done by an excessive and outrageous

(a) 1 B. & C. 477.

(b) 8 A. & E. 198.

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tempest, and not by any of those accidents of ordinary occurrence to which such a liability must be restricted. The learned Baron who presided left this question to the jury, who thereupon acquitted the defendant. A rule for staying the judgment and proceedings, till a second trial could be had, was obtained, on account of this direction, as well as for the rejection of evidence tending to shew that the defendants and their predecessors who held the same lands had in fact repaired against the effects of the more violent tempests.

After argument, and consulting the authorities, we are clearly of opinion that a liability of a more extended nature may well exist by law. Many prescriptive liabilities to repair must have existed before the date of the earliest statute for the issuing of commissions sewers: many such may now exist where no commission has issued: in such cases there is no legal reason to limit the liability by any thing but the ability of the party liable, or the value of the lands granted, as the case may be. And it is clear that a commission sewers can have no effect upon these liabilities, other than to provide intermediately for the safety of the level, before the individual chargeable shall have been compelled, or be able to restore the defences. *Case* (pp. 144, 145.) is express that the commissioners are bound by precedent prescriptions, customs, and tenure and we think that, rightly understood, there is nothing either in *Rooke's* (a) or *Keighley's* (b) cases that at all conflicts with the law as we have stated it.

We do not take upon us to say what was the extent of the defendants' liability in the present case; but

(a) 5 Rep. 99 b.

(b) 10 Rep. 139 a.

then

there was evidence to shew that it went beyond that to which the direction of the learned Judge might lead the jury to suppose it limited by law; and the jury therefore ought to have decided upon it as a matter of fact, upon all the evidence.

The evidence here rejected was two-fold. First: Orders of the court of sewers made a hundred years ago, which were deemed inapplicable, because they were not proved to have been carried into effect. Secondly: Presentments by the jury, to which the same objection was made. We are very clearly of opinion that such orders were good evidence, as adjudications by a court of competent jurisdiction over the subject-matter, unless they were affected by proof of fraud or collusion; and that at so great a distance of time their execution might well be presumed. On the admissibility of the presentments we prefer giving no opinion, as the facts are not quite clearly before us. Perhaps it may not be thought prudent to tender them on the next trial.

Rule absolute.

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Thursday,
May 30th.

EARLE against BROWNE.

In 1835 *B.* granted a life annuity of 180*l.* to *E.*, secured by a warrant of attorney, on which judgment was entered up, by an assignment of a pension, and by a power of attorney to receive it in payment of the annuity. A memorial of this grant was duly enrolled. In 1837, the parties, at the request of *B.*, executed an indenture, whereby *E.* covenanted to accept an annuity of 150*l.* in lieu and satisfaction of the former one of 180*l.*, and *B.* covenanted not to redeem it for a certain period; and it was declared that the annuity deed of 1835 and all collateral securities should be securities for the payment of the reduced annuity:

Held, that the latter annuity was void, under stat. 53 G. 3. c. 141. s. 2., for want of enrolment; and the Court, upon motion, set aside, not only the annuity deed of 1837, but also that of 1835, together with the warrant of attorney and judgment thereon, and the power of attorney to receive the pension.

Held, also, that the Court had no power to impose terms on *B.*

ON 13th *February* 1835, the defendant, with two sureties, in consideration of the sum of 1200*l.*, covenanted with the plaintiff, by deed, to pay him an annuity of 180*l.* during defendant's life, secured by an assignment of a pension of 500*l.* per annum awarded to him by the Lords of the Treasury by way of compensation for the loss of an office in the customs; and at the same time executed separate warrants of attorney by way of collateral security, and also a power of attorney, enabling the plaintiff to receive the whole of his pension in payment of the annuity. A memorial of the annuity so granted on the above terms was duly enrolled. In 1837, defendant applied to plaintiff to reduce the amount of the annuity, which the latter consented to do, rather than allow it to be redeemed. A further deed was thereupon, on 6th *May* 1837, executed by and between the above parties, whereby the plaintiff covenanted with the defendant and the two other grantors of the said annuity to accept an annuity of 150*l.* in lieu of 180*l.*; and the defendant and his two co-grantors, in consideration of the said covenant by the plaintiff, covenanted not to redeem the annuity before the 10th *April* 1842. It was further declared, by the last-mentioned deed, that the deed of *February* 1835, and the collateral securities for the annuity of 180*l.*, should be securities for the

payment

ayment of the annuity of 150*l.*, in the same manner as the last-mentioned annuity had been granted by the deed of 1835 instead of the annuity of 180*l.* No memorial of the deed of 6th *May* 1837 was ever enrolled.

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against
BROWNE.

In *Trinity* term, 1838, Sir *W. W. Follett*, on the part of the defendant (who had become insolvent) and his assignees, upon the above statement of facts appearing upon affidavit, obtained a rule nisi to set aside the annuity deeds, the warrant of attorney and a judgment thereon, the power of attorney, and all other deeds and documents given to secure the annuities granted as above, on six different grounds; one of which was, that the deed of 6th *May* 1837 was never enrolled according to stat. 58 G. 3. c. 141. s. 2. As the judgment of the Court was founded upon this objection only, the rest are here omitted.

In opposition to the above rule, affidavits were filed stating, among other things, that the reduction of the annuity was made at the urgent request of the defendant *Browne*, in order to enable him to obtain a further advance of money on the same security; that he had become insolvent; that his assignees had applied without success to the Commissioners of Customs to pay his pension to them, and not to the plaintiff; that the Court for the Relief of Insolvent Debtors had refused to send a recommendation to the Commissioners to pay the pension, or any part thereof, for the general benefit of the creditors, because it had been duly assigned before the petition of the insolvent; and that the application to set aside the annuity was made solely at the instigation of the assignees. It further appeared

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appeared that the deed of *May* 1837 was, in form covenant by the plaintiff with the defendant and e of the two other grantors of the original annuity, ' accept and take an annuity or yearly sum of 150*L.*, to paid at the same times and in the same manner as, the within written indenture, is provided for the p ment of the within mentioned annuity or yearly sun 180*L.*, in lieu and full satisfaction of the annuity yearly sum of 180*L.*, covenanted to be paid and secu by the within written indenture."

Erle and *Miller* now shewed cause. The deed 1837 was not a grant of a fresh annuity, but onl covenant, on the one part, not to redeem for a cert period; on the other, to take a less sum than the fendant was originally bound to pay. It was a rele of 30*L.* out of every annual payment of 180*L.* The ject of the statute was the protection of the grant and this has been satisfied by the enrolment of original grant. The second transaction was a m indenture of mutual covenants, entered into at the quest and for the benefit of the defendant. In *As v. Gwinnell* (a) there was an additional charge, mentioned in the memorial; yet the grant was uph At all events, the Court will not, upon this ground objection, set aside more than the last instrument; the omission to enrol a memorial of an alteration in terms of a previous valid annuity cannot vitiate s annuity, nor entitle the Court to set aside all the p vious securities.

(a) 3 *Y. & J.* 136.

Kelly, *contra*. The instrument executed in 1837 was an essential alteration of the former terms, not only in favour of the defendant, but also of the plaintiff. The annuity was then made irredeemable for a certain time; and this was one of the considerations for the reduction in the annual sum. The old security is superseded by the new one, and is kept on foot only as a security for the latter. The memorial now contains neither a true statement of the consideration, nor of the annual sum. The giving up the former annuity upon new terms constitutes the consideration for which the reduced annuity was granted. To enforce the second transaction, under such circumstances, would defeat the intention of the legislature. Then, as the old securities and judgment thereupon are expressly made securities for the second annuity, it follows, of course, that the Court will set aside all, and not merely the unenrolled instrument. [*Patteson J. Hammond v. Foster* (a) nearly resembles your case.] There, the original deeds were set aside, because there was an attempt to make them securities for a second invalid transaction.

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LORD DENMAN C. J. I have no doubt on the case. We shall repeal the statute, if we decide that this second annuity need not be registered; for there will be a total absence of that security which the legislature has required. We are bound to set aside the second bargain, because that is now the real one between the parties; and, as the former securities, and the judgment thereon, have become securities for the latter bargain, these also must be set aside.

(a) 5 T. R. 695.

1839. LITTLEDALE J. The alteration of an annuity requires enrolment just as much as the original grant.

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PATTESON and WILLIAMS Js. concurred.

Erle. Will the Court impose terms on the defendant?

Per Curiam. We have no power to do so (a).

Rule absolute to set aside and vacate the annuity deeds of 13th February 1835, and 6th May 1837, together with the warrant of attorney and judgment thereon, and the power of attorney given by defendant to plaintiff to receive the pension or compensation allowance of defendant of 500*l.* per annum. Rule discharged as to so much as relates to all other deeds and documents given to secure the annuities by the first-mentioned deeds granted (b).

(a) See *Ex parte Lewis*, 2 A. & E. 135.

(b) As to the power of setting aside annuity deeds in a summary way for defects other than those mentioned in sect. 6 of 53 G. 3. c. 141., see the cases on the old stat. 17 G. 3. c. 26. *Symonds v. Cobourne*, 1 B. & P. 482. *Storton v. Tomlins*, 2 Bing. 475.

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The QUEEN *against* The Inhabitants of
STAFFORD.

Saturday,
June 1st.

The QUEEN *against* The Inhabitants of
COSTOCK.

THE two following cases in the Crown paper were argued at the same time by the direction of the Court.

In *The Queen v. The Inhabitants of Stafford* an order for the removal of *John, William, and James Blackbourne*, of the ages of eight, seven, and two, respectively, children of *John Blackbourne*, deceased, by his wife *Anne* afterwards *Anne Ford*, from the township of *Maltby* in the West Riding of the county of *York*, to the parish of *Stafford* in the county of *Stafford*, was on appeal confirmed as to the two elder children, and quashed as to the youngest, subject to the opinion of this Court on the following case.

Anne Ford, the mother of the three children named in the order, is now the wife of *James Ford*, to whom she was married in *October 1836*. Her late husband, *John Blackbourne*, who died in *1834*, was settled in *Stafford*. The question is, whether the two elder children of *John Blackbourne* (both of whom, at the time of making the order, were above the age of seven years), having gained no settlement in their own right, are removeable from *Maltby* to *Stafford*, their late father's settlement; *James Ford*, their stepfather, whose settlement is in *Maltby*, having run away and left his wife

A man having, in 1836, married a widow with children by her first husband, ran away and left them chargeable to the parish. Held, that the children above the age of nurture might, notwithstanding stat. 4 & 5 W. 4. c. 76. s. 57., be removed from their mother to the place of her first husband's settlement, though they were under the age of sixteen.

Where a child within the age of nurture is removed from its mother, and that fact appears on the face of the order and in the special case, yet the Court of Queen's Bench will confirm it, unless the objection was relied upon in the notice of the grounds of appeal.

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and her aforesaid children chargeable to the township
 of *Maltby*.

Pashley and *J. T. Ingham*, in support of the order of sessions. *Rex v. Walthamstow* (a) and *Regina v. Wenden* (b) are in point. They decide that the settlement of the children of a former marriage is unaltered by the provisions of 4 & 5 W. 4. c. 76. s. 57. Then the children, being above the age of nurture, must be removed; and the appellant parish may enforce the law against the stepfather, if he can be found, and charge him with their support.

Sir *Gregory A. Lewin* and *Dundas*, contra. The question is, whether the children are removeable to their place of settlement until the age of sixteen. The act makes them "part of" the "family" of the second husband. They are, therefore, irremoveable from his family. Sect. 71 shews the intention of the legislature: it enacts that a bastard shall follow the mother's settlement till the age of sixteen, and shall be maintained by her, "as a part of her family." This shews that the object was to keep the child under the immediate protection of the mother; and there seems no good reason why a legitimate child should be in a worse condition in this respect than a bastard. If the father were of ability to maintain the children, there could be no removal. Suppose then, that he returns to *Maltby*, and is able to support them, are they to be removed back to *Maltby*? If they are, is the removal to be at the expense of *Stafford*?

(a) 6 Ad. & E. 301.

(b) 7 Ad. & E. 819.

The Queen v. The Inhabitants of Costock an order of removal of two children of *J. Dexter*, deceased, aged respectively eight and six, by *Susannah*, his wife, afterwards the wife of *W. Marviler*, from the parish of *Radford* in the county of *Nottingham*, to the parish of *Costock* in the same county, was on appeal confirmed, subject to the opinion of this Court on the following case.

The paupers are the legitimate children of *J. Dexter* and *Susannah* his wife. In September 1834 *J. Dexter* being, at the time of his death, lawfully settled in the appellants' parish of *Costock*. In August 1836 *Susannah*, his widow, was married to *William Marviler* who is lawfully settled in the respondent parish of *Radford*, and, at the time of making the order, the two children, the paupers, were residing with their mother in the workhouse of *Radford* and actually chargeable to that parish. The grounds of appeal, as stated in the notice, were as follows. "The parish of *Costock* appeals against the removal of *Lucy* and *John Dexter* from the parish of *Radford*, because by 5 W. 4. c. 76. s. 57. enacts that every man who marries a woman, having a child or children, shall be liable to maintain such child or children as a part of his family; nor, in the case of the step-father of these children, is there sufficient evidence that he is unable to maintain them without the assistance of his parish, until, only so long as, he is receiving relief in the workhouse. The parish of *Costock* does not deny the settlement of these children, but only their liability for their support so long as they are under the age of sixteen, their mother shall continue the wife of *William Marviler*." No evidence was offered on either side as to the circumstances of *William Marviler*.

D. X.

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N. R. Clarke

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N. R. Clarke and Wildman, in support of the order relied on the cases cited above in *Regina v. Stafford*.

Whitehurst and Willmore, contra. The parish *Radford* is bound to support the children as part their step-father's family, though their settlement may be in *Costock*. The object of the statute is to extend the period of nurture to sixteen years, and to prevent the separation of mother and child during that time. [*Paterson J.* The words of sect. 57 are, such "children shall, for the purposes of this act, be deemed a part of such husband's family," not for the purposes of nurture, or any other purpose.] One purpose is that of maintenance. The father is made "chargeable" for relief given to such children: now "chargeable" is a technical word, implying parochial relief given to the father, which must necessarily be by the parish in which the father is settled. So sect. 56 enacts that relief to such children under the age of sixteen shall be considered as relief to the second husband, which can only be given regularly by the parish in which the latter is settled. In fact, the children are not chargeable at all but the father in respect of the children. The removal of the children will occasion difficulties in carrying into effect the act: thus sect. 58 enables the commissioners to declare relief, given to the husband, to be given by way of loan: and sect. 59 provides a remedy for repayment of the loan by process, at the suit of the relieving parish, against the master or employer of the pauper for the purpose of attaching any wages that may be due; and, upon default of the master, payment is to be enforced in "the like manner as penalties and forfeitures are recoverable under this act;" viz. by dis-

tre

ress and sale, under sect. 99. Now the penalties, when so levied, are to be paid, "to or for the use of the parish or union *where such offence shall have been committed*, to be applied in aid of the poor rate of such parish or union." So that, if the children are, to be relieved by a distant parish, who are to recover the amount from the step-father's master, it will generally happen that the wages so recovered will go to increase the funds of another parish than the one which is to be reimbursed. Independently of this objection, it appears on the face of the order of removal, and of the special case, that one of the paupers is under the age of nurture; and, though no objection on this ground was made in the notice of the appellants, yet, as the objection appears on the face of the proceedings, both the court of quarter sessions and this Court will notice it. [*Rex v. Bromyard (a)*, *Rex v. Boulbee (b)*, *Rex v. Withernwick (c)*, were cited, contra.]

LORD DENMAN C. J. The decision of the sessions in both cases is right. The children are still to be maintained by the parish which was liable to support them before the second marriage of their mother; and they may be removed accordingly. With respect to the additional point made in the second case, no advantage can now be taken of any objection which was not adverted to in the notice of the grounds of appeal.

LITLEDAL J. The language of the 71st section differs from that of the 57th, which must, therefore, be interpreted by itself. In the 71st section the settlement

(a) 8 B. & C. 240.

(b) 4 A. & E. 498.

(c) 6 A. & E. 273.

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PATTESON J. *Rex v. Walthamstow (a)* and *Regina v. Wendron (b)* shew that the settlement of the children is neither altered nor suspended for all purposes. The question is, whether they are irremovable during the life of the step-father, and before the age of sixteen? It is clear that upon his death they are removeable; yet the mother will then have acquired the settlement of her second husband, and therefore be separated from her children. So that the argument drawn from the supposed intention of the legislature to keep them under the mother's protection fails. As to any difficulties that may arise in carrying into effect the 59th section, from the removal of the children into a different parish, we cannot on that account put a forced construction on the words of the previous section, which are satisfied by holding that the father shall be liable to reimburse the parish in which the children are settled, and from which they receive relief.

WILLIAMS J. concurred.

Order of Sessions confirmed in both cases.

(a) 6 A. & E. 301.

(b) 7 A. & E. 819.

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The QUEEN *against* JAMES.*Saturday,
June 1st.*

AT the quarter sessions of the county of *Carmarthen*, an order was made on *Theophilus James* to reimburse, and to pay a weekly sum to, the parish officers of *Conwilt in Elvet*, for the maintenance of a bastard child, subject to the opinion of this Court on the following case.

The notice of an application for an order in bastardy, under stat. 4 & 5 W. 4. c. 76. s. 78., signed by the churchwardens and overseers of the parish, is sufficient, though the parish is part of a union under sect. 26 of the Poor Law Amendment Act, and none of the guardians have signed it.

At the quarter sessions in *July* 1838 an application was made to the Court by the overseers of the parish of *Conwilt in Elvet* in that county for an order in bastardy against *T. James*, under the stat. 4 & 5 W. 4. c. 76., for the maintenance of a male bastard child born of *S. Jones*, and chargeable to the said parish.

The applicants having gone through the necessary proof, and satisfied the Court by corroborative evidence as to the liability of *T. James*, an objection was raised on his behalf to the sufficiency of the notice of the intended application, which was in the following form.

To *T. James* of *M.* in the county of *Carmarthen*: —
Whereas *S. J.*, late of &c., single woman, was on &c. delivered of a male bastard child, and the said child, by reason of its said mother being unable to provide for its maintenance, on &c., became chargeable to the parish of *Conwilt in Elvet*, and from thence hitherto has been maintained by the said parish: and whereas the undersigned, being the churchwarden and the overseers of the poor of the said parish, have made diligent inquiry as to the father of the said child, and find that you are the father of the same: Therefore take notice that, at

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 ———
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the next general quarter sessions of the peace to holden &c., we, as such churchwarden and overseer intend to make application to the Court for an order upon you to reimburse the said parish for the maintenance of the said child. Given under our hands, &c.,

D. T. }
 H. D. } Churchwarden,
 D. D. } and Overseers.

It was admitted that the parish of *Conwil* in *Elwet* was one of several parishes united by the commissioners under stat. 4 & 5 W. 4. c. 76. into an union called the *Carmarthen Union*, and that it returned one guardian as its proportion to the board; that the notice was only signed by the churchwarden and overseers of the parish, and that it was not signed by the guardian returned by the parish, or by any other guardian of the union. The objection taken to its sufficiency was that, since the formation of unions under the said poor law act, the churchwardens and overseers of any parish, being within an union and returning a guardian to the board, were not the proper persons to sign notices of this description. It was contended for the respondent that the notice should be signed by the guardians of the union or a competent part thereof; or that, at all events, it should have been signed by the guardian returned by the parish. The Court overruled the objection, but suspended the order until the opinion of the Court could be obtained thereupon.

Chilton and *Byles*, in support of the order, were stopped by the Court.

E. V. Williams and *R. C. Nicholl*, contra. Section 72 enacts that the "overseers or guardians of such parish, or the guardians of any union in which such parish may be situate, may, if they think proper, after diligent inquiry as to the father of such child, apply to the next general quarter sessions" &c. By sect. 73, "No such application shall be heard at such sessions unless fourteen days' notice shall have been given under the hands of such overseers or guardians, to the person intended to be charged" &c.; and, by the same section, full costs and charges shall be paid "by such overseers or guardians," if the Court does not make the order of filiation. The reasonable construction of the act is, that, where there are guardians, the guardians shall apply; where there are none, then the overseers shall apply. Any other construction will give occasion to difficulties, and defeat the object of the act. Where there is an union, "the ordering, giving, and directing of all relief to the poor" is under the control of the guardians alone; and the overseers can give none, except with their sanction, or in cases of urgency; sect. 54. Now *Regina v. The Justices of Cambridgeshire* (a) decides that the maintenance of bastards is "a matter connected with the relief of the poor." It is, therefore, a matter in which the legislature has thought it inexpedient to trust the overseers, where there are guardians. If either may apply, then both may do so, and the sessions may be at a loss which of the concurrent applications is to be heard first, or whether both are to be heard; and the party may be harassed by double proceedings, of which he may have to pay the costs. All

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(a) 7 A. & E. 480. See the judgment, *ibid.* 490.

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these questions are avoided, and the act receives a consistent and sensible construction, reddendo singula singulis. Where there are guardians under stat. 22 G. 3. c. 83. (*Gilbert's act*), it would be clearly inconsistent with its provisions to permit applications to be made by churchwardens and overseers.

Lord DENMAN C. J. The notice is agreeable to the provisions of the act, and is given by the proper persons.

LITTLEDALE J. Either the overseers or guardians may give the notice.

PATTESON J. The parish, and not the union, is interested in the application. There is no common fund applicable by the union to any purposes, except those which affect the whole union; the expense of maintenance falls exclusively on the parish. It is, therefore, not unreasonable that the parish officers should have the power to apply for an order.

WILLIAMS J. concurred.

Order confirmed (a).

(a) See 2 & 3 Vict. c. 85., and *Regina v. The Justices of Wills*, post, Sittings in Banc. after M. T. 1840.

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DOE on the several demises of GRAVES and
DOWNE against WELLS and TROWBRIDGE.

Monday,
June 3d.

EJECTMENT for lands in *Wiltshire*. The several demises were alleged in the declaration to have been made on 17th *October* 1836, habendum for seven years, from 15th *October* 1836. After pleas pleaded, *Wells* compromised with the lessors of the plaintiff, but *Trowbridge* continued to defend. On the trial before *Patteson J.*, at the *Wiltshire* Summer assizes, 1837, it was proved, on the part of the plaintiff, that *Graves*, the lessor of the plaintiff, was entitled to the reversion upon a lease under which *Trowbridge* held, which lease was for ninety-nine years, to end in 1888, determinable on certain lives not yet expired, at a rent. It was further proved that, on 17th *October* 1836, *Graves's* agent, in a conversation with *Trowbridge*, who was then in possession, demanded the rent of him, but *Trowbridge* then refused to pay it, and asserted that the fee was in himself. The counsel for the plaintiff contended that this was a disclaimer, working a forfeiture of *Trowbridge's* term; the defendant's counsel disputed this, and contended further that, even supposing this to be a forfeiture, the demise was laid too early, being on the very day of the supposed forfeiture. The learned Judge directed the jury to find for the plaintiff, if they were of opinion that the words used by *Trowbridge* were not mere idle language, but a serious claim of the fee. The jury having found for the plaintiff, the learned Judge reserved leave to the defendant's counsel to move to enter

A tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own.

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a verdict for the defendant. In *Michaelmas* *te Crowder* obtained a rule accordingly.

Erle and *Barstow* now shewed cause. As t of the demise, *Roe dem. Wrangham v. Hersey* that it may be the day on which the title of th the plaintiff accrues. There the title, it is tru by death of the ancestor, not, as here, by d but that can make no difference. *Doe dem Crowdor (b)* was a case of disclaimer: but in there was nothing to carry back the disclaim the day of the demise. Secondly, the discla worked a forfeiture. That takes place whe tenant does any act inconsistent with the landlord and tenant, especially if derogato landlord's title. In *Doe dem. Ellerbrock v.* the tenant gave up possession to a hostile cl fraud of the landlord, for the purpose of en claimant to set up the adverse title against the and this was held to be a forfeiture of th term. So a disclaimer dispenses with a notie even where it is doubtful whether there be which the disclaimer will apply; here the term shewn to have existed at the time of the c [Littledale J. There are several cases in C Forfeiture (d), of forfeiture by acknowledging title on record.] In *Hovenden v. Lord Annesle Redesdale* assumed that the assenting by a ten

(a) 3 Wils. 274.

(b) 1 Cr. M. & R. 398. S. C. 4 Tyrwh. 852. See *Doe Litherland*, 4 A. & E. 784.

(c) 1 Cr. M. & R. 137. S. C. 4 Tyrwh. 619.

(d) See (A 5.).

(e) 2 Sc. & Lef. 607. See p. 625.

claim of a stranger was a forfeiture. It is not necessary that the disclaimer should be on record: a record is merely a stronger evidence than an act *in pais*. In the case of *Lord Dormer's ejectment* (a) it was held that a term was forfeited, where a termor assigned it to a trustee, and then made a feoffment to gain the freehold. The principle, according to *Mr. Preston* (a), is that the term is forfeited by the fraud of the termor in attempting to gain the freehold; and that the admission (by the assignee) of a title to the reversion in a stranger is an attornment, which works a forfeiture, because it is an abandonment of the tenancy and a destruction of the privity between the termor and the reversioner. [*Littledale J.* What is the act done in the present case?] The making a claim of the freehold by the termor. [*Littledale J.* Is that an act?] It is an act within the principle of the authorities. In 4 *Bac. Abr.* 884. (b), *Leases*, [T. 2.], it is said, "Here it is to be observed, that any act of the lessee, by which he disaffirms or impugns the title of his lessor, occasions a forfeiture of the lease. For to every lease the law tacitly annexeth a condition, that if the lessee do any thing that may impair the interest of his lessor, the lease shall be void, and the lessor may re-enter. Indeed, every such act necessarily determines the relation of landlord and tenant; since to claim under another and at the same time to controvert his title, to hold under a lease, and at the same time to destroy the interest out of which the lease ariseth, would be the most palpable inconsistency. A lessee may thus incur a forfeiture of his estate by act

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(a) See note (b) to *Doe dem. Maddock v. Lynes*, 3 B. & C. 399.

(b) 7th ed.

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in pais, or by matter of record." No instances perhaps can be adduced of a forfeiture of a term for a given number of years by mere words claiming the title: but such a case is clearly within the principle. If a stranger bring waste against the tenant, and the tenant plead *no waste done*, the term is forfeited (a). That is on the ground that such pleading creates a difficulty to the landlord. A conveyance to operate by the statute of uses works no forfeiture, because, being innocent, it does not hurt the title of the landlord. A tenancy from year to year is put an end to, without notice, by a disclaimer. There can be no distinction, in this respect, between a term for a given number of years, and tenancy from year to year: there might be a term created for a hundred years determinable at any time by half a year's notice from either party. The greater number of the old authorities indeed speak of a forfeiture of a life estate; but this arises only from terms being comparatively modern. A forfeiture of a tenancy from year to year is, legally, a forfeiture of a term: the decisions, in such cases, have not rested upon the principle that the disclaimer shewed that no term existed for then no notice would have been necessary at all whereas the professed principle has always been that notice was dispensed with by the disclaimer. Thus: "if a tenant hold from year to year, the landlord cannot maintain an ejectment without giving six months' previous notice, unless the tenant have attorned to some other person, or done some other act disclaiming to hold as tenant to the landlord; and in that case no notice is necessary;" *Throgmorton v. Whelpdale* (b). In

(a) *Com. Dig., Forfeiture*, (A 5.) citing *Co. Litt.* 252. a. and 1 *Rel. Abr.* 853. *Estate*, (G), pl. 11.

(b) *Bul. N.* P. 96.

Doe dem. Gray v. Stanion (a) a tenant from year to year claimed verbally to hold the estate as his own, but under such circumstances that the Court considered the claim not necessarily inconsistent with the tenancy; and, therefore, it was held that there was no forfeiture: but the Court said, "it does not appear to be necessary that any act should be done, as distinguished from a verbal disclaimer; a disavowal by the tenant of the holding under the particular landlord, by words only, is sufficient;" adding, "but, in order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant; or to a distinct claim to hold possession of the estate, upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it." These remarks establish fully the doctrine for which the plaintiff contends; and this, as well as the case of *Hovenden v. Lord Annesley* (b), shew that Lord Coke is incorrect in saying that an attornment *in pais* works no forfeiture; *Co. Lit.* 252. a. In *Doe dem. Lewis v. Cawdor* (c) the disclaimer insisted upon was by letters: but there was no forfeiture, because the Court thought the language of the letters did not go far enough. In *Doe dem. Grubb v. Grubb* (d) it was held that a tenancy from year to year was determined by the tenant having written a letter to the reversioner's attorney, stating that his connection as a tenant had ceased for several years. A copyholder's estate is, on a feudal principle, similar to that now contended for, for-

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(a) 1 M. & W. 695. S. C. Tyrwh. & G. 1065. See *Doe dem. Williams v. Cooper*, 1 Man. & G. 135.

(b) 2 Sch. & Lef. 625.

(c) 1 Cr. M. & R. 398. S. C. 4 Tyrwh. 852. (d) 10 B. & C. 816.

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feited by default of attendance where there is sufficient notice; *Sir John Braunche's Case* (a), *Anonymous case in Godbolt* (b), where it is said that a refusal by a copyholder to pay rent, because he hath it not, "is no forfeiture, but the denial ought to be a wilful denial; which shews that a wilful denial will work a forfeiture. It may be urged that tenancies will be endangered by applying the rules of forfeiture so stringently: but the Court will not deviate from the authorities upon such considerations. The legislature, when they provided against surrenders not made by writing, in stat. 29 C. 2 c. 3. s. 3., did not prohibit forfeitures by word of mouth.

Crowder and Butt, contra. Supposing the Court to be of opinion that the case, as to the first point, is with *in* the authority of *Roe dem. Wrangham v. Hersey* (c), *still* there is here no forfeiture. Assuming the language to have been as strong as possible, and to have amounted to a distinct repudiation of the landlord's title and a claim of the freehold by the tenant, yet there is no authority for treating this as a forfeiture of the term. It is true that a lease for years may be subjected to forfeiture under the same circumstances as a life estate; but in neither of the passages referred to, on the other side, in *Bacon and Comyns*, is there any instance of a forfeiture of estate by mere words. From *Co. Lit.* 251. a., 251. b., 252. a., it appears that a forfeiture may be worked by alienation, — and that either *in pais* or by matter of record —; or by claiming too great an estate, or affirming the reversion or remainder to be in a stranger, — and

(a) 1 *Leon.* 104.(b) *Godb.* 142. pl. 176.(c) 3 *Wils.* 274.

these

these only by matter of record. But even a feoffment without livery, or a conveyance in fee by lease and release, work no forfeiture, because, though they are in principle disavows of the reversioner's right, they divest no estate. It is said that the effect of a record is merely to strengthen the evidence: but the authorities confine forfeitures of this kind to matter of record. Thus in *3 Bac. Abr. 196 (a)*, *Estate for Life and Occupancy*, (C), it is said, "Another way of forfeiture in a court of record is, by claiming a greater estate than he had by the feudal donation, or by affirming the reversion to be in any other person than his lord. This seems to be grounded on a rule in the old feudal law, that if a vassal denied that he held the feud of his lord, and it was proved against him, such a denial was a forfeiture. Now this denial may be when the vassal claims the reversion himself, or accepts a gift of it from a stranger, or acknowledges the reversion to be in a stranger; for in all these cases he denies that he holds the feud from the lord: but, as by the feudal law the vassal was to be convicted of this denial, so in our law these acts, which plainly amount to a denial, must be done in a court of record, to make them a forfeiture; for such act of denial appearing on record is equivalent and equally conclusive as a conviction upon solemn trial; and all other denials, that might be used by great lords for trespassing their tenants, and for a pretence to seize their estates, by our law were rejected, for such convictions might be made by such great lords where there was no just cause: but the denial of the tenure upon record could never be counterfeit, or be abused to any injus-

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tice ; and therefore this notorious and solemn act of the tenant was retained as a just cause of forfeiture by law." In the words following the passage cited on the other side from 4 *Bac. Abr.* 884 (a), *Leases and Terms for Years*, [T. 2.], the forfeiture by act in pais is confined to alienations which displace the estate of the reversioner. The doctrine of disclaimer was perhaps carried farther in *Doe dem. Ellerbrock v. Flynn* (b) than elsewhere : but even there the tenant had done an act by giving up the possession for the purpose of defeating his landlord's title. Here there is no act done ; and the landlord does not appear to be in any way damaged. The Statute of Frauds, 29 C. 2. c. 3. s. 3., has been referred to ; but it is clear that the general intent of the legislature was to provide against the effect of mere oral declarations. Forfeitures by words spoken were not provided against, because they were not recognised before. The dictum in *Hovenden v. Lord Annesley* (c) is, as admitted on the other side, contrary to the doctrine of Lord Coke : and, as the decision in that case was, that there was no forfeiture under the particular circumstances, the dictum is extra-judicial : but, assuming it to be correct, an attornment is still an act. It is true that notice to quit may be dispensed with in the case of tenancies from year to year by proof of words spoken by the tenant : but that is because such a tenancy is from year to year so long as the parties please. Such cases are not instances said by Best C. J. in *Doe* : notice to quit is only

requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy, there can be no necessity for a notice to end that which he says has no existence." *Throgmorton v. Whelpdale* (a), *Doe dem. Gray v. Stanion* (b), *Doe dem. Grubb v. Grubb* (c), were cases of tenancy from year to year: and no greater estate was shewn to exist in the defendant in *Doe dem. Lewis v. Cawdor* (d).

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LORD DENMAN C. J. I think *Doe dem. Ellerbrock v. Flynn* (e) is distinguishable from the present case. There it was thought that the tenant had betrayed his landlord's interest by an act that might place him in a worse condition: if the case went farther than that, I should not think it maintainable. The other instances are cases either of disclaimer upon record, which admit of no doubt as to the nature of what is done, or of leases from year to year, in speaking of which the nature of the tenancy has been sometimes lost sight of, and the words "forfeiture" and "disclaimer" have been improperly applied. It may be fairly said, when a landlord brings an action to recover the possession from a defendant who has been his tenant from year to year, that evidence of a disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy, from its particular nature, was limited. But no case, I think, goes so far as the present: and I feel the danger of allowing an interest in law to be put an end to by mere words.

(a) *Bul. N. P.* 96.

(b) 1 *M. & W.* 695. *S. C. Tyrwh. & Gr.* 1065.

(c) 10 *B. & C.* 816.

(d) 1 *Cr. M. & R.* 398. *S. C. 4 Tyrwh.* 852.

(e) 1 *Cr. M. & R.* 137. *S. C. 4 Tyrwh.* 619.

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LITLEDALE J. We should not, indeed, be in putting an end to a state of law on account of danger; for we must give parties whatever entitles them to: but here the law leads to a consequence. The case is not like that of a lease from year to year, which lasts only as long as the parties please, and where what has been called a disclaimer is evidence of the cessation of the will. If property is claimed on the ground of forfeiture, we assume the jury to have been right in their verdict, still the facts do not go far enough for a forfeiture. *Comyns's Digest*, tit. *Forfeiture*, and in *Viner's Abridgement*, tit. *Estate (a)*, a very great number of instances of forfeiture are given; but there is no allusion to any of this kind: the instances are either of matter of record, or of acts in pais quite different from what was insisted upon. In an *Anonymous Case* in *Godolphin*, the tenant claimed the fee on the record, in an action of debt; and yet it was held to be no forfeiture. *dem. Ellerbrock v. Flynn (c)* has been satisfactorily distinguished by my Lord.

PATTESON J. No case has been cited where a lease for a definite term has been forfeited by mere words. We know that mere words cannot work a disclaimer, although some acts have been held to work a disclaimer, the election of the party disseised, which, as against the disseisor, would not work a disseisin. An attornment is an act. Here there is no act; and, if we held this to be a forfeiture, we should be going much beyond

(a) See 10 *Vin. Abr.* 370. sqq. *Forfeiture*, (C. b), &c.

(b) *Godol.* 105. pl. 124.

(c) 1 *Cr. M. & R.* 137. *S. C.* 4 *Tyrwh.* 619.

previous decision. It is sometimes said that a tenancy from year to year is forfeited by disclaimer: but it would be more correct to say that a disclaimer furnishes evidence in answer to the disclaiming party's assertion that he has had no notice to quit; inasmuch as it would be idle to prove such a notice where the tenant has asserted that there is no longer any tenancy.

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WILLIAMS J. concurred.

Rule absolute (a).

(a) See note (b) to *Sir Simon Leech's Case*, *Freem. K. B. and C. P.* 503.

JOSEPH COLES, REBECCA GOODE, and BENJAMIN COLES, Executors of TEMPERANCE CREED, *Monday, June 3d.*
against The Governor and Company of the Bank of ENGLAND.

CASE for refusing to transfer stock and pay dividends.

The first count stated that *Temperance Creed*, at the time of her death, was proprietor of and lawfully entitled to a certain share or interest to a large amount, to wit, to the amount of 2,220*l.* 16*s.* 9*d.*, of and in certain stock called the 3 per cent. consols, which in her lifetime was standing in her name in defendants' books, and had not, at the time of the committing &c., been transferred in the lifetime of the testatrix by her nephew C., who had brought another woman to personate her, and forge her signature. After the sale, testatrix had repeatedly received the warrants for the reduced dividends in person, and had signed the warrants and the bank books, being on those occasions accompanied by C., who mentioned the amount of dividends in her presence. The jury found that she had the means of knowing of the transfer, but that there was no evidence of actual knowledge; that she had been guilty of gross negligence, and that the defendants had not been guilty of any:

Held, that the facts were a defence on the plea of Not guilty.
Held, also, that they furnished evidence in support of pleas denying that testatrix was proprietor of the stock; and a plea denying that sufficient money had been received by defendants for paying the dividends.

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ferred or assigned by her or by plaintiffs, or any them, or by any attorney lawfully authorised by the or any of them; and that plaintiffs, as her executors were, at the time &c. proprietors of, and lawfully entitled to, such share or interest, and entitled to transfer it: that it was the duty of defendants, at all reasonable times, to make or enter in the said books such transfer of the said share or any part thereof, as plaintiffs as such executors, or either of them, should authorise or require: that plaintiff, *Joseph Coles*, as such executor, after the death of *Temperance Creed*, and at a reasonable time for that purpose, and for the benefit of plaintiffs as executors, requested defendants to suffer and permit the said share to be transferred in the said books into the name of one *J. S.*, and to suffer to be made in said books a proper entry or registry of such transfer. Averment of offer by *Joseph Coles* to make the transfer and entry, and by *J. S.* to accept the transfer. Notice to defendants. Breach; refusal by defendants to make, or suffer to be made, such transfer and entry. Averment that in a reasonable time before making such request, the will of testatrix and probate thereof had been duly entered in the office of the Accountant-General of the Bank of *England*, &c.

The second count, after introductory averments as the first, stated the title of plaintiffs as executors to receive the interest and dividends on the above stock that after the death of testatrix a large sum, to wit 33*l.* 6*s.* 3*d.*, for and on account of a half yearly dividend in respect thereof, was due; that *Joseph Coles*, as executor, on behalf of himself and the other plaintiffs as executors, attended at the Bank to receive the sum, and requested defendants to pay it to him on his

half of himself and the other plaintiffs; that, although sufficient money had, before such request, been duly issued, and received by defendants (a), for the purpose of paying such dividend, and although it was the duty of defendants to pay it to plaintiff J. C. as executor on request, yet defendants would not, when so requested, or at any other time, pay the said sum of money or any part thereof, to plaintiffs, or either of them, as executors, or to any attorney duly authorised by them. Profert of letters testamentary.

Pleas. 1. Not Guilty. 2. As to first count, that *Temperance Creed* was not at the time of her death the proprietor of, or lawfully entitled to, the said share or interest in the said stock, modo et formâ. 3. As to the second count, same plea. 4. As to the second count, that sufficient money for paying the said dividend had not been received by defendants for the purpose in the second count mentioned, modo et formâ.

On the trial before Lord Denman C. J. at the adjourned sittings after *Trinity* term 1837 it appeared that the testatrix had from time to time bought stock in the 3 per cent. consols from the year 1819 until 1828, having made the last purchase on 29th April 1828, at which time the whole amount of the several purchases was 2220*l.* 16*s.* 9*d.* She was in the habit of attending in person every half year to receive her dividends, and was, on those occasions, accompanied by her nephew, the plaintiff *Benjamin Coles*, who, in her presence, mentioned the amount of the dividend. It further appeared that *B. Coles*, who was much trusted by the deceased, was a clerk at the Bank, and, as such, well acquainted with the state of her account there; that he

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(a) See *The Bank of England v. Davis*, 5 B. & C. 185.

had,

1839. had, without her authority or knowledge, from time to time sold out portions of the stock by means of a woman whom he represented as Mrs. Creed the deceased, and who forged the signature of Mrs. Creed to each transfer.

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The sales were as follows : —

1827, August 7.	-	-	-	£500 stock.
1828, February 15.	-	-	-	250
March 16.	-	-	-	150
October 9.	-	-	-	250
November 25.	-	-	-	300
1829, April 22.	-	-	-	200
August 25.	-	-	-	300
1830, January 15.	-	-	-	150
July 9.	-	-	-	115
				<hr/> £2215 <hr/>

The last dividend received by the testatrix was on 120*l.* 16*s.* 9*d.* in July 1830, just before the last sale by *B. Coles (a)*.

Upon receipt of the dividend, the testatrix always signed the dividend books, and also the dividend warrants, both of which shew, on the face of them, the actual dividend paid. She died in August 1830, at a very advanced age.

The probate was left by plaintiff *B. Coles* at the will office at the Bank, when, according to the usual practice, he stated the amount of the claim to be “5*l.*, and some odd shillings.” In fact it was 5*l.* 16*s.* 9*d.* The will was duly registered. On the detection of the fraud

(a) See, further, as to these transactions, the statement of facts in the judgment, p. 448. post.

by

by his co-executors, he was indicted under 38 G. 3, c. 39, sects. 1 & 2, for the forgery, but was acquitted, and left the country.

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In December 1830, *J. Coles* and *R. Goode*, the co-executors, claimed to be admitted to transfer the whole sum of £220*l.* 16*s.* 9*d.* The defendants, protesting against any legal liability, offered to replace 115*l.* stock, being the sum transferred on 9th July 1830, but declined any further compliance with the plaintiffs' request. Whereupon this action was commenced by the two co-executors in the name of all. At the trial, the jury found, in reply to questions put to them by the Lord Chief Justice, that, 1. the testatrix had the means of knowing that the transfers had been made; 2. there was no sufficient evidence that she did in fact know of them; 3. she had been guilty of gross negligence; 4. the Bank had not been guilty of any negligence. A verdict was entered for the defendants, with liberty to move to enter a verdict for the plaintiffs. *Platt*, in the following Michaelmas term, obtained a rule to shew cause why a verdict should not be entered accordingly for such amount as the Court should think fit; or a new trial had. In last Easter term

Sir F. Pollock and *Bayley* shewed cause (*a*). There is no pretence for recovering in respect of the smaller sum, for there was no refusal to transfer it. The first count truly alleges a refusal to transfer the entire amount of original stock, but the defendants were never requested to transfer the less amount, nor would they, on request, have refused to do so. In this form

(*a*) 3d May 1839. Before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge* J.

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of count, in which it is not even stated that the defendants refused to transfer the share "or any part thereof," the sum is indivisible and the plaintiffs must recover for all or none. Where a creditor draws for 501*l.* on his debtor who owes him only 500*l.*, the latter is not bound to accept pro tanto. As to the second count, the plaintiffs might have recovered a less dividend than the sum demanded; but there never was any refusal to pay it. If the action had been in form *ex contractu*, it might have been necessary for the defendants to plead a tender or readiness to pay the sum actually due; but here the question is, whether they have wrongfully refused to pay what was due. But the principal question is, whether the Bank of *England* can be made liable, in this, or indeed in any, form of action, to replace stock transferred by a person professing to act for the proprietor, after the proprietor has repeatedly recognised the transfer by receiving dividends on the reduced amount? The repeated receipt of such dividends is a recognition of the transfer, which binds the party, and is not merely proof of a previous authority, which may be rebutted. The testatrix received the dividends in person, and on six different occasions signed the warrants and dividend books, which shew upon the face of them the real amount paid. The amount was on each occasion mentioned in her hearing. Her advanced age, which was relied upon by the plaintiffs to rebut the charge of gross negligence, and to shew that undue advantage had probably been taken of her, was only a topic for the jury, and would have been equally available if she had herself received the money. Suppose a customer signs and settles his book with his banker after his balance has been reduced by forged drafts; can he bring

bring money had and received for the original balance? There is nothing to shew that the testatrix was not actually aware of the transfers, and it was on this ground that the plaintiff *Benjamin Coles* was acquitted upon the indictment. [Lord Denman C. J. There is no doubt that, in fact, she did not know of them, but had been deceived by the fraud of her nephew.] Actual knowledge is not essential; it is enough that she had the means of knowledge, and that she had grossly neglected to avail herself of them. Ignorance of fact is no excuse, where there is laches. *Bilbie v. Lumley* (a), *Milnes v. Duncan* (b). Whatever is sufficient to put a person upon inquiry is equivalent to notice; *Smith v. Low* (c). Here, too, the person to whom the fraud is imputed is himself one of the plaintiffs, and must be taken to have known what he himself did. The gross negligence of the testatrix has misled the defendants, and has induced them to believe that the transfers have been effected with her consent. In such a state of facts the rule stated in *Pickard v. Sears* (d), and affirmed in *Gregg v. Wells* (e), is applicable, viz., that a person who wilfully acts so as to convey a certain impression to another, and induce him to alter his position accordingly, cannot afterwards be permitted, as against the party deceived, to shew that the impression was unfounded. If then the negligence of the testatrix be a defence, it is evidence under either "not guilty," or the pleas denying the testatrix's property. That it is a defence under the general issue, is established by *Gough v. Bryan* (g) and *Bridge v. The Grand Junction Rail-*

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(a) 2 East, 469.

(b) 6 B. & C. 671.

(c) 1 Atk. 490. See also *Marsh v. Keating*, 1 New Ca. 198, 220.

(d) 6 A. & E. 469.

(e) Antè, p. 90.

(g) 2 M. & W. 770.

1889. *way Company (a)*. And the second plea is support by proof that the stock has been transferred. The doctrine laid down in *Davis v. The Bank of England (b)*, that stock, sold under a forged power, is to be regarded as still standing in the original name, is not satisfactory, and has been since questioned. But all difficulty on that point is avoided here by the repeated recognition of the sales, and the ratification of the acts of *B. Coles* by the testatrix. It is clear that if alive, she might now sue him for the proceeds of the sales; *Stone v. Marsh (d)*, *Marsh v. Keating (e)*; and that the stock is therefore to be considered as no longer standing in her name. The form of the plaintiffs' action, if any, should have been case for improperly, and without authority, transferring the stock. By the form here adopted, the defendants are ousted of the plea of the Statute of Limitations; for if the stock is to be regarded as still belonging to the original stockholder, no lapse of time after the transfer can divest him of his right to sue. Another question arises in this case, whether two of several persons jointly interested can demand a transfer of the joint stock? No demand is alleged, or was proved to have been made, by *B. Coles* the plaintiff and co-executor. [*Littledale J.* There may be a request by one to permit a transfer by all, for the benefit of all. Lord *Denman* C. J. If one demands with the authority of the rest, and the defendants refuse, not because the others are absent but upon other and different grounds, the refusal is a sufficient breach. *Patteson J.* Suppose trover is brought upon a demand and a refusal on a particular ground, can the

(a) 3 *M. & W.* 244.(b) 2 *Bing.* 393.(c) See *Stracy v. Bank of England*, 6 *Bing.* 754.(d) 6 *B. & C.* 551.(e) 1 *New Ca.* 198.

defendants

defendant afterwards insist on a different ground of refusal (a)? It would be a dangerous doctrine. Besides, this point was not made at the trial.]

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Platt, W. H. Watson, and Peacock, contra. There is no proof that the testatrix heard the answers given by her nephew with respect to the amount of stock, or got the dividend warrants paid to herself, or did more than merely sign her name. But supposing gross negligence to be clearly established, it is no defence to this action, nor any evidence under the present issues. It is not found that she knew of the sales; it is therefore impossible to presume a ratification of them by her. *Davis v. The Bank of England* (b) shews that the stock is still to be treated as standing in her name, and is therefore now vested in her executors. That case is unimpeached by any of the later decisions, which only shew that the stockholder may elect to affirm the sale, and follow the proceeds into the hands of the unauthorised vendor. The judgment was reversed on grounds independent of the merits; *The Bank of England v. Davis* (c). It is difficult to see how the mere fact of negligence or carelessness could divest the testatrix of her property without some legal conveyance or transfer. In *Pickard v. Sears* (d) the party charged with the deception was himself fully acquainted with the facts: here the testatrix was herself deceived. There are two pleas under which it is attempted to raise this defence. First, Not guilty, which merely denies that the defendants refused to transfer the stock, or to pay the dividend. Under this plea, the question of

(a) See *Crowther v. Ramsbottom*, 7 T. R. 654.

(b) 2 Bing. 393.

(c) 5 B. & C. 185.

(d) 6 A. & E. 469.

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negligence is irrelevant. The cases cited on the other side, in which such proof was held admissible under this plea, were cases in which negligence was the gist of the action, and the only inquiry was, whether the injury complained of happened by the fault of the defendant, or of the plaintiff himself. Secondly, The plea denying the property. Now it is certain that the testatrix was once the owner of so much stock, and it is also clear that she continued possessed of it till her death, unless there was some valid transfer. The acts of parliament creating stock have provided the modes of transferring it. The transfer is to be entered and registered; the entry is to be signed by the party making the transfer, or by his attorney authorised by writing under hand and seal and duly attested; the assignee must underwrite his acceptance, and "no other method of assigning or transferring the said stock, and the annuities attending the same, or any part thereof, or any interest therein, shall be good or available in law." (a) Neither mode, pointed out by the statutes, was in truth adopted. No degree of negligence will dispense with the requisite forms. There are indeed cases in which negligence or acquiescence will prevent, or induce, the interference of a court of equity; thus the mortgagee who permits his mortgagor to hold his deeds may in equity be postponed to a subsequent incumbrancer; but the legal rights of parties, which alone this court can look at, remain unaltered. [*Patteson J.* Would you contend that, if the testatrix had gone alone to the Bank, and herself demanded only the less amount, she would not have been bound by it?] The argument certainly goes to that extent. Her conduct, even if fraudulent, would

(a) Stat. 18 G. 2. c. 9. s. 31. The act for consolidating the different stocks, 25 G. 2. c. 27., was also cited.

have

have been no answer at law; or, if pleadable at all, should have been pleaded by way of estoppel. [Patteson J. Do you find instances of such pleas of estoppel by matter *in pais* (a)?] Such pleas are no doubt rare; but the pleading of a recovery in ejectment in reply to a traverse of the title in a declaration for mesne profits, *Doe v. Huddart* (b), and the decision in *Vooght v. Winch* (c), shew that the estoppel must be pleaded, in order to make it a bar. It can be no decisive defence upon this issue, unless gross negligence absolutely changes the property. [Lord Denman C. J. It was insisted upon as conclusive evidence to the jury.] Except by way of estoppel, it cannot be conclusive. If negligence will confirm an invalid transfer, what degree of it will be sufficient? Will the acceptance of a reduced dividend on a single occasion be enough to make good the forged authority? As a ratification, it is a mere nullity; for the statute requires a power of attorney under seal to transfer stock; and a parol ratification can never be good, where an original authority cannot be given by parol. At all events, there was no ratification of the last sale, for there was no subsequent receipt of a dividend. Nor are the plaintiffs precluded by the form of declaration from recovering pro tanto; for the only material allegation is the possession of "a certain share or interest" in the 3 per cent. consols, and the actual amount is laid under a *videlicet*. [Patteson J. Should not there be a demand of the proper amount of stock, or, at least, of so much

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(a) See *Veale v. Warner*, 1 Wms. Saund. 323, 325., and note (4) to the same case, 325 a.

(b) 2 C. M. & R. 316. S. C. 5 Tyr. 846. See also *Doe v. Wright*, post, decided in the vacation after this term.

(c) 2 B. & Ald. 662. And see *Bowman v. Rostron*, 2 A. & E. 295, note (6) to *Bowman v. Taylor*.

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as was due, generally?] The request alleged is permit "the said share" to be transferred, and this request is not denied. Indeed the request is duly averred in both counts, and is not traversed by any plea; that the objection made to the informality of the demand if it had any weight in fact, is not raised on the record. Then it is objected that the action is misconceived, and should have been for transferring without authority. [Lord Denman C. J. There is not much in that point. If the stock has not been legally transferred, it remains the property of the representatives of the testatrix.] As to the argument that one of the plaintiffs, *B. Coles*, is the person who committed the fraud; is necessarily joined in the action as a co-plaintiff, issues, not for his own benefit, but in his representative character.

Cur. adv. r.

Lord DENMAN C. J. now delivered the judgment of the Court. [After stating the pleadings, his Lordship proceeded.] The facts proved on the trial were remarkable. *Benjamin Coles*, the nephew of the testatrix, and in some sort her man of business, one of the executors also, and of course one of the plaintiffs, clerk in the Bank of *England*, and was in the habit of accompanying the testatrix when she received her dividends. She signed receipts both in the dividend warrants, and in the Bank books. He must have received the full amount of dividend that would have been due if the original amount of stock had continued in his hands but he had in fact, in the interval, taken the dividends over to a woman to the Bank, who personated the testatrix time to time, and, as often, forged the signature.

testatrix to several transfers of the stock, till at last a very small sum was left. The action was founded on the 18 G. 2. c. 9., creating the stock, and especially on the thirty-first section, which enacts that the stock shall be transferred by the party's signature as there prescribed, and in no other manner whatsoever; and reliance was placed on *Davis v. The Bank of England* (a), where the Common Pleas, acting on that principle, allowed the plaintiff, a stockholder, to recover the amount of his stock against the Bank, though there was some kind of evidence of an adoption by the plaintiff of the forgery, by which the defendants had been induced to place several purchasers on their books in lieu of the plaintiff, as holders of the same stock. That case was reversed in error on the form of two of the counts, *The Bank of England v. Davis* (b); but the general doctrine does not appear to have been impeached: indeed, it is hardly more than the language of the act of parliament, though exceptions to it may arise out of particular circumstances. It might be added that the statutory provision in no wise differs from the common law liability of the banker to pay the money which he keeps for his customer, when some stranger, by a forgery, has abstracted the amount from his possession.

The defence was mainly upon the general issue, and was said to be made out by the facts already recited.

The argument was, that the testatrix had, by gross negligence, brought about, or at least greatly contributed to produce, the loss which has accrued; so that her representatives are precluded from complaining of the Bank in respect to it. The proof of this was said to result from the facts found by the jury on questions

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(b) 5 B. & C. 185.

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which I submitted to them, namely, that the testatrix, though she was herself defrauded, and did not know of the diminution of her stock, yet had the means of knowing it, and was guilty of gross negligence in receiving the dividends on the reduced sums without objection; and that the Bank was not guilty of any negligence in making the transfers and paying the dividends. In these particulars, the case bears a strong resemblance to *Hume v. Bolland (a)*, as reported in *Ryan & Moody*, which was not mentioned in the argument here, where bankers had, in their books, credited their employers with dividends as received, and were held to be bound by their own entries, though the money had never been received by the house, but had been fraudulently obtained by one of the partners, and kept for his own use; *Best C. J.* asking the jury whether the plaintiffs had acted negligently, which the verdict negatived; whether the bankers had not acted with gross negligence, which the verdict affirmed.

The case of *Hume v. Bolland (a)*, which was an issue directed by the Chancellor, does not appear to have been satisfactorily decided at *Nisi Prius*; for the facts found on the trial were afterwards stated in a case laid before the Court of Exchequer (*Hume v. Bolland (b)*), which held that the amount of the monies so credited could not be proved by the trustees as a debt against the banker's estate. But this was on the ground that the bankers had never received the money at all, and that the trustees might still recover the dividends against the Bank, who had parted with them without any authority. The question of negligence did not there appear necessary

(a) *Ry. & M.* 371.(b) 1 *C. & M.* 130. *S. C.* 2 *Tyrwh.* 575.

for the decision ; but the doctrine that parties, guilty of negligence which alters the rights of others, may be bound by it, was fully recognised. It was not sufficient to convert a false entry by one partner into proof that the money was received by all ; yet it would, consistently with that case, protect a party sued for a wrongful refusal to do that which it had disabled him from doing.

Precisely the same doctrine was laid down by the same learned Chief Justice and the whole Court of Common Pleas, in *Davis v. The Bank of England* (a), to which the plaintiffs have recourse on this occasion: "We agree" "that if it had appeared that the Bank had paid these dividends to persons to whom (if the plaintiff had informed them of the forgeries as he ought to have done)" "they could have refused to pay them, he cannot recover such dividends in this action." "But we say that it does not appear on this case" that they have so paid them: "no evidence of any such payment appears." If, then, it had appeared that, through the default of *Davis*, the Bank had paid away his dividends, he would not have been entitled to recover. Now, in this case, the jury have, in effect, found that the testatrix's gross negligence led the Bank to believe those transfers duly made, of which her executors now complain.

The facts, then, which have been found by the jury in this case, entitle the defendants to a verdict on the plea of Not guilty. They also furnish evidence on the second and third pleas, in which it is alleged that the testatrix was not a proprietor of the stock ; for we are of opinion that, notwithstanding the strong words of stat. 18 G. 2. c. 9., a stockholder may so conduct himself as

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(a) 2 Bing. 393, 409.

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to be precluded from claiming in that character. For example, the transfer is only to be made by underwriting by the parties, or, in their absence, by lawful attorneys appointed with certain formalities. But suppose the proprietor, being present, had not underwritten the transfer, but had connived at the underwriting of his name by another; or, being absent, had expressly requested another to go and sign his name, the act would not have been complied with, yet the property would have passed from the stockholder. In such a case, indeed, fraud would have been an ingredient, but we apprehend that any culpable conduct, by which the relation of the parties to the property is completely altered, will have the same effect. The verdict must be the same on the last plea also, of which the meaning is, that the defendants have been induced, by the conduct of the testatrix, to become responsible to others for that fund which they had possessed for her use, and to part with the money which they had received from government to pay her dividends.

Leave was reserved at the trial to enter a verdict for the plaintiffs not only on those general points, but also on the refusal to transfer the sum of 115*l.*, the last remnant that the testatrix had left standing in her name. But, on looking at the admissions, we do not find that any specific demand to this effect was made; so that there could be no wrongful refusal to comply with it.

Rule discharged.

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GREEN *against* CRESSWELL.Tuesday,
June 4th.

ASSUMPSIT. The first count of the declaration stated that, on 2d *February* 1836, a *capias*, directed to the sheriff of *Warwickshire*, issued from the Court of Exchequer against one *Joseph Hadley*, at the suit of one *John Reay*, which was indorsed for bail for 35*l.*, and was delivered to the sheriff, who, on the day and year aforesaid, arrested *Hadley*; that afterwards, towit 9th *February* 1836, in consideration that plaintiff, at the request of defendant, would become bail and surety for *Hadley*, and would, as such bail and surety, seal, and as his act and deed deliver to the said sheriff, a bail bond, conditioned for putting in special bail by *Hadley*, defendant then promised plaintiff that he, defendant, would save harmless and indemnify plaintiff from all payments, damages, costs, and expenses which he, plaintiff, should or might incur, bear, pay, sustain, or be put unto by reason or by means of so becoming bail and surety; that plaintiff, confiding &c., did afterwards, towit on the day and year last aforesaid, at the request &c., seal and deliver the bail bond, but that *Hadley* did not put in special bail, whereby the bond became forfeited; that afterwards, towit 15th *February* 1836, the sheriff assigned the bail bond to *Reay*, who thereupon afterwards, towit on the day and year last aforesaid, sued the present plaintiff on the bond in the Court of Exchequer, and recovered judgment for 75*l.* 5*s.* damages and costs; and afterwards, towit 11th *August* 1836, sued

If plaintiff become bail for a stranger, in consideration of defendant's request, and of defendant promising to indemnify plaintiff against the consequences, no action lies upon such promise unless it be in writing, under stat. 29 C. 2. c. 3. s. 4.

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sued out execution by fieri facias against the no-
plaintiff, who was thereby compelled to pay 98*l.* 6*s.* : of
all which defendant had notice. Breach, that defend-
ant had not indemnified plaintiff, nor repaid him any
the 98*l.* 6*s.*, nor divers other sums expended for cost
&c., towit 50*l.* &c.

Second count on an account stated.

Pleas. — 1. Non assumpsit. Issue thereon.

2. To first count, actionem non; because the pro-
mise in the first count mentioned was a special promise
to answer for the debt and default of another person, in
manner and form as in the said first count is stated and
set forth; and that no agreement in respect of or relating
to the promise and supposed cause of action in the said
first count mentioned, or any memorandum or note
thereof, wherein the consideration for the said special
promise was stated or shewn, was in writing, and signed
by the defendant, or by any person thereunto by him
lawfully authorised, according to the statute &c. Re-
plication, that the said promise was not a special promise
to answer for the debt or default of another person
in manner and form &c. Issue thereon.

On the trial, before *Park J.*, at the *Warwickshire*
Summer assizes, 1837, evidence was given of the promise,
as stated in the declaration; but no evidence was
given of any writing. The learned Judge was of
opinion that the case was not within the Statute of
Frauds; and a verdict was found for the plaintiff, on the
replication to the second plea. In *Michaelmas term*,
1837, *Goulburn* Serjeant obtained a rule for a new trial,
or arrest of judgment.

Balgrin

Balguy now shewed cause (a). This is not a case within sect. 4 of the Statute of Frauds, stat. 29 C. 2. c. 3. The defendant is not charged "upon any special promise, to answer for the debt, default or miscarriages of another person." When the promise was made, no debt was due from *Hadley* to this plaintiff, nor had *Hadley* committed any default or miscarriage. Nor is this action brought in consequence of any failure, on *Hadley's* part, to perform any thing which he was legally liable to perform. The contract of the defendant created an original liability on his own part: before the promise, no one was liable legally to do that which the defendant is now sued for not doing. The contract, therefore, which is now sued on, is altogether one between the plaintiff and the defendant. In *Thomas v. Cook* (b) the plaintiff, at defendant's request, entered into a bond jointly with him to indemnify a third party; in consideration of which the defendant promised to save the plaintiff harmless from loss by means of the bond: and it was held that an action might be brought upon this contract, though it was not in writing; *Boyley J.* saying, "a promise to indemnify does not, as it appears to me, fall within either the words or the policy of the Statute of Frauds." [Lord Denman C. J. referred to *Thomas v. Williams* (c).]

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Goulburn Serjt. and *Mellor*, contra. It makes no difference whether the liability was incurred, or default committed, by *Hadley* before or after the promise of the defendant; *Jones v. Cooper* (d), *Anderson v. Hayman* (e), *Matson v. Wharam* (g). The cases are collected in

(a) Before Lord Denman C. J., *Littledale, Patteson, and Williams Js.*

(b) 8 B. & C. 728.

(c) 10 B. & C. 664.

(d) 1 Cowp. 227.

(e) 1 H. Bl. 120.

(g) 10 M. & W. 200.

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note (2) to *Forth v. Stanton* (a), beginning with *Read v. Nash* (b); and there the doctrine in *Matson v. Wharam* (c) is recognised; and in note [i] it is pointed out that *Kirkham v. Marter* (d) overruled *Read v. Nash* (b), where it had been held that a promise to pay a party money, if he would withdraw the record in an action of assault and battery against a third person, was an original promise, and therefore not within the statute, because it did not, at the time of the promise, appear that the third party was liable: and it is shewn that a promise is not taken out of the statute by being founded on a new consideration, because such a rule would, in effect, do away with the statute. The promise is to be looked to, not the consideration. The question, as there pointed out, is, whether the party, for whose debt, default, or miscarriage it is said that the defendant has promised to be answerable, be liable after the promise. Where the original liability is released, or the existing remedy abandoned, the case is not within the statute, because there is now no answering for the default of the third party; and this explains *Williams v. Leaper* (e), *Castling v. Aubert* (g), *Edwards v. Kelly* (h), *Goodman v. Chase* (i), *Barrell v. Trussell* (k), and *Harris v. Huntbach* (l). And so these cases appear to be understood in *Thomas v. Williams* (m). Now, here, *Hadley* was liable to the last to protect the plaintiff from the consequences of becoming bail; *Fisher v. Fallows* (n). In *Toussaint v. Mat-*

(a) 1 *Wms. Saund.* 211. a.(c) 2 *T. R.* 80.(e) 2 *Wils.* 308. *S. C.* 3 *Bur.* 1886.(h) 6 *M. & S.* 204.(k) 4 *Taun.* 117.(l) 1 *Bur.* 373., and 2 *Sel. N. P.* 855. (9th ed.).(m) 10 *B. & C.* 664.(b) 1 *Wils.* 305.(d) 2 *B. & Ald.* 613.(g) 2 *East*, 325.(i) 1 *B. & Ald.* 297.(n) 5 *Exp.* 171.

tinnant

tenant (a) Ashurst J. said, "There is no doubt but that wherever a person gives a security, by way of indemnity for another, and pays the money, the law raises an *assumpsit*." The principle upon which the original liability rests is exemplified in *Exall v. Partridge* (b), *Adamson v. Jarvis* (c) (recognised by Lord Denman C. J. in *Betts v. Gibbins* (d)), and the language of the Court in *Wolveridge v. Steward* (e). In *Thomas v. Cook* (g) the defendant was himself liable upon the bond, independently of the promise upon which he was sued. [Patteson J. It may be said that the default there was the default of the plaintiff himself in part.] The dictum of Bayley J. in that case cannot be supported; and *Winckworth v. Mills* (h) is the other way. *Buckmyr v. Darnall* (i) is strongly in favour of the defendant: the Court there treated the question as turning upon the doubt, whether or not the third party was liable; and, having determined that he was so liable, they considered the defendant's promise to be collateral, and within the statute. *Jones v. Cooper* (k), *Fish v. Hutchinson* (l), and *King v. Wilson* (m), confirm this view.

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Cur. adv. vult.

LORD DENMAN C. J. afterwards, in this term (June 11th), delivered the judgment of the Court. After stating the facts, his Lordship proceeded as follows.

A motion has been made in arrest of judgment, the

(a) 2 T. R. 104.

(b) 8 T. R. 308.

(c) 4 Bing. 66.

(d) 2 A. & E. 75.

(e) 1 C. & M. 660. S. C. 3 Tyrwh. 653. Reversing the judgment of C. P. in *Steward v. Wolveridge*, 9 Bing. 61.

(g) 8 B. & C. 728.

(h) 2 Esp. 484.

(i) 2 Ld. Raym. 1085.

(k) 1 Cowp. 227.

(l) 2 Wils. 94.

(m) 2 Str. 873.

promise

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against
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promise appearing by the plea not to have been in writing, and the replication only averring in answer that it was not a special promise to answer for the debt or default of another.

The promise in effect is, "If you will become bail for *Hadley*, and *Hadley*, by not paying or appearing, forfeits his bail bond, I will save you harmless from all the consequences of your becoming bail. If *Hadley* fails to do what is right towards you, I will do it instead of him."

If there had been no decisions on the subject, it would appear impossible to make a reasonable doubt that this is answering for the default of another. The case most relied on by the plaintiff is that of *Thomas v. Cook* (a), where this Court held that a promise of *B.* to hold *A.* harmless against the consequences of his entering with *B.* and *C.*, at *B.*'s request, into a joint bond to indemnify *D.* against debts due from *C.* and *D.* was binding, though not in writing; *Bayley J.* and *Parke J.*, the only Judges present, saying that a promise to indemnify does not fall within the words or policy of the statute. But the reasoning in this case does not appear to us satisfactory in support of the doctrine there laid down; which, taken in its full extent, would repeal the statute. For every promise to become answerable for the debt or default of another may be shaped as an indemnity; but, even in that shape, we cannot see why it may not be within the words of the statute. Within the mischief of the statute it most certainly falls.

Adams v. Dansey (b) does not bear out the general doctrine. That was a promise by one parishioner to

(a) 8 B. & C. 728.

(b) 6 Bing. 506.

indemnify

indemnify another against the consequences of resisting claim of tithe. This is not becoming responsible for debt or default of any other, but merely promising to pay what the promisee may lose by defending the promisor's interests in a suit.

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In some of the cases the language employed seems to assume that the debt, default, or miscarriage must have been incurred at the time of making the promise. But the common case of becoming responsible for goods applied to another on the faith of that promise, and of course after it, shews that criterion to be inadmissible.

A distinction was also hinted at, from the circumstance of *Hadley's* debt being due to a third person, and default therefore incurred towards him, not towards bail. But here again is the surmise of an intention of the legislature which none of its language bears out; and, besides, may it not be said that the arrested debtor, who obtains his freedom by being bailed, undertakes to stand bail to keep them harmless, by paying the debt, or surrendering?

There does not appear any objection to the test laid down in the note to 1 *Williams's Saunders*, 211 c. (a); and it is decisive in favour of the objection. The original party remained liable; and the defendant incurred no liability except from his promise.

Rule absolute for arresting the judgment.

(a) Note (2) to *Forth v. Stanton*.

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Tuesday,
June 4th.

CRESSWELL *against* WOOD.

Plaintiff having promised to indemnify *G.* against the consequences of a bail bond into which *G.* had entered at plaintiff's request, and *G.* being forced to make a payment in consequence, it was agreed between plaintiff and defendant that plaintiff should obtain the money by discounting a bill drawn by plaintiff and accepted by defendant.

Plaintiff sued defendant on the bill; and defendant pleaded that it was accepted for plaintiff's accommodation.

Held, that a jury might find for defendant on this issue, although plaintiff was not liable on his promise to indemnify, it not being in writing.

ASSUMPSIT on a bill of exchange for 28*l.*, drawn by plaintiff on, and accepted by, defendant, and for interest, and on an account stated.

Pleas. — 1. To first count, that defendant did not accept. Issue thereon.

2. To first count, that the bill of exchange was accepted by the defendant at the request of the plaintiff, and merely for the accommodation of the plaintiff; and that there never was any other consideration whatever for the defendant's so accepting the said bill as in the declaration mentioned, or for the defendant's paying the amount thereof, or any part thereof. Replication, *de injuriâ*.

3. To second and third counts, Non assumpsit. Issue thereon.

On the trial before *Park J.*, at the *Warwickshire* Spring assizes, 1838, it appeared, by evidence on the part of the plaintiff, that, in *March* 1836, a person named *Green*, who was son in law of the defendant, applied to the plaintiff, who was an attorney, to set aside a judgment obtained against him, *Green*, on a bail bond given by him in a suit of *Reay v. Hadley*: that the plaintiff obtained a stay of proceedings, on payment of costs by *Green*, amounting to 28*l.*: that afterwards the plaintiff's *London* agent wrote to the plaintiff, informing him that, unless the 28*l.* was forthwith sent to *London*, execution would issue against *Green*; that information of this was immediately given by the plaintiff

the defendant, *Green's* father in law, and that it was agreed between them that the plaintiff should obtain the money by discounting a bill which the defendant should accept; that this was done; and that the present action was brought on the bill so accepted. The plaintiff also gave evidence of conduct on the part of the defendant, which, as contended, shewed a recognition of his liability upon the bill. The defendant gave evidence to shew that *Green* had become bail for *Hadley* at plaintiff's request, and upon his promise to indemnify *Green*; so that the 28*l.* was really advanced upon plaintiff's own account. *Green* was called as a witness for the defendant, and, upon cross examination, admitted that he had, upon the proceedings to set aside the judgment on the bail bond, made an affidavit which contained statements at variance with his present testimony, but of the contents of which he said that he was not fully cognisant at the time that he made it. For the plaintiff it was contended that, even upon the facts set up by the defendant, the bill could not be drawn for the plaintiff's accommodation, since the promise to indemnify was not binding, as it did not appear to have been made in writing (a). The learned Judge told the jury that, if they thought the plaintiff had indemnified *Green*, they might find that the bill was drawn for the plaintiff's accommodation. Verdict for defendant on the second plea, and on the pleas to the second and third counts. In *Easter* term, 1838, *Goulburn* Serjt. obtained a rule for a new trial, on the ground of misdirection,

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(a) *Reay* having afterwards recovered judgment against *Green*, *Green* sued the present plaintiff on his promise to indemnify; and this Court held that, as the promise was not in writing, the action could not be maintained: *Green v. Cresswell*, *antè*, p. 453.

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and upon the evidence; and it was ordered that the rule should come on for argument with that in *Green v. Cresswell (a)*, then standing in the new trial paper.

Balguy now shewed cause (*b*), and *Goulburn Serjt.* and *Mellor* were heard in support of the rule. The nature of the arguments will appear from the judgment.
Cur. adv. vult.

Lord DENMAN C. J. afterwards, in this term (*June 4th*), delivered the judgment of the Court. After stating the pleadings, his Lordship proceeded as follows.

The evidence was direct to shew that the plaintiff had persuaded *Green*, the defendant's son in law, to become bail for one *Hadley*, on a promise to indemnify him against all consequences; and that the bill was drawn in order to enable *Cresswell* to meet the demand when made. The plaintiff, on the other hand, said that he was not liable on his promise, because it was void for want of writing; but this is an inconclusive argument. He was bound, in honour and conscience, to keep his promise, whether written or unwritten, and might not be aware, when this bill was given, of the advantage offered to him by the statute. The bill might have been accepted for his accommodation, that is, at his request, without any consideration, for the purpose of meeting a claim which might not be capable of enforcement at law.

The plaintiff also proved many things said and done by defendant, which shewed that he thought himself

(a) *Antè*, p. 453.

(b) Before Lord Denman C. J., *Littledale, Patteson, and Williams Js.*
 liable

liable to pay this acceptance; but this argument is open to a similar answer. He might not be aware of the defence afforded against an action brought on his own acceptance, by its having been given for the drawer's accommodation.

The learned Judge appears to have taken up the cause strongly in behalf of the defendant, at which we cannot wonder, when we consider what the transaction was. *Green* was called as a witness by the defendant; and the plaintiff contradicted him by his own affidavit. He swore that he was not aware of what he was required to swear; and the affidavit was drawn up by *Cresswell*, though sworn to by *Green*. The Judge said that the affidavit made no difference in the case; nor did it, if that fact was true. He exposed himself to just censure, if he deposed upon oath to any thing he did not fully understand; but the jury were to consider of the explanation; and they must have been satisfied with it.

On the whole, we do not think this verdict ought to be disturbed.

Rule discharged.

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1839.

Tuesday,
June 4th.

GARDNER and Others, Assignees of STRUTTON, a Bankrupt, *against* MOULT and Three Others, Public registered Officers of the Northern and Central Bank of ENGLAND.

Where a petitioning creditor, having ascertained that an agent in his service could prove an act of bankruptcy, sent him for that purpose to be examined on the opening of the fiat; Held, that the deposition, then made, was evidence of the act of bankruptcy as against such creditor, in an action against him by the assignees, in which the act of bankruptcy was put in issue.

ASSUMPSIT for money had and received for the use of plaintiffs, as assignees of *Strutton*. Account stated.

Pleas. 1. That *Strutton* did not commit any act of bankruptcy before the issuing of the fiat in bankruptcy against him. 2. Non assumpsit. 3. That, before the issuing of the fiat, the sum mentioned in the first count was bonâ fide, and not by way of fraudulent preference, paid by *Strutton* to the copartnership on account of a larger sum in which he was then indebted to the copartnership for money lent to, and paid, laid out and expended, by the copartnership for, him at his request, &c.; and that the copartnership had not, before or at the time of such payment, notice of any act of bankruptcy committed by *Strutton*. Verification. 4. That the payments were made to the bank on a current banking account between *Strutton* and the Bank; that advances had since been made to him by the Bank on the credit of such payments; and that, at the times when such payments were made by *Strutton*, and the advances were made to him by the bank, the copartnership had no notice of any act of bankruptcy. Verification. 5. Plea of mutual credit, with a similar averment of no notice of any act of bankruptcy.

Replication to 1st plea, that *Strutton* did commit an act of

bankruptcy before the issuing of the fiat. To the 3d, 4th, and 5th pleas, that the copartnership had, before the respective times of payment &c., notice of an act of bankruptcy. Defendants gave notice, before the trial, of their intention to dispute the act of bankruptcy, and that *Strutton* had committed any before or at the time of issuing the fiat.

At the trial, before *Coltman J.*, at the *Liverpool Summer* assizes, 1837, the only evidence of the act of bankruptcy offered by the plaintiffs was a deposition made by one *D. Hay*, the manager of a branch establishment of the same banking copartnership at *Chester*. The directors of the bank had struck a docket against *Strutton*, upon which the fiat issued; and their solicitor, upon discovering that *Hay* was able to prove an act of bankruptcy, sent him to *Manchester*, where a fiat was issued upon a deposition made by him, shewing that *Strutton* had absented and secreted himself with intent to defeat his creditors on certain occasions, and at certain times, therein specified. *Hay* was not a shareholder; nor had he any connection with the bank but was manager.

The evidence was objected to as inadmissible, especially as issue was joined on the act of bankruptcy, and a notice was given to dispute it. The learned judge admitted it. Verdict for plaintiffs.

In the following *Michaelmas* term *Sir F. Pollock* obtained a rule nisi to enter a nonsuit, or for a new trial.

Cresswell and *Alexander* now shewed cause. An affidavit used by a party is always admissible against him.

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him. This is an affidavit by an officer of the company, made by their direction, in support of their proceeding, and used by their solicitor. It is therefore evidence against the defendants as much as if it had been a statement by the defendants themselves: *Brick v. Hulse* (a). Besides, the bank directors, having themselves struck the docket and obtained the fiat, are in a condition to dispute the bankruptcy. Thus, the petitioning creditor cannot shew that the debt was insufficient to support the commission; *Harmer v. Davis* (b): or dispute the bankruptcy; *Ledbetter v. Salt* (c). So admissions by a defendant of the plaintiff's character will dispense with strict proof of their title as assignees, even where their title is distinctly put in issue and there is a notice of an intention to dispute it; *Ing v. Spence* (d). Where trespass was brought by a bankrupt to try the validity of the commission, evidence of his having applied to this Court to be discharged from custody on the ground that he was a bankrupt and that the defendant, at whose suit he was in custody, had proved his debt, was held conclusive against the plaintiff: *Watson v. Wace* (e). *Hay* was not a mere witness for the bank, but was identified with them for the purposes of the affidavit and fiat.

Sir *F. Pollock*, *Wightman*, and *Cowling*, contra. The doctrine, that they who take out a fiat shall not deny the bankruptcy, is not disputed. The question here was, not merely whether *Strutton* was a bankrupt, but

(a) 7 A. & E. 454.

(b) 7 Taunt. 577.

(c) 4 Bing. 623.

(d) 1 C. M. & R. 432. S. C. 5 Tyrwh. 8.

(e) 5 B. & C. 153.

whether

whether an act of bankruptcy had been committed by him at a certain time. The date was material, because the payments sought to be recovered were alleged to have been made after notice of the bankruptcy. There is no rule of evidence that a party shall be affected by an affidavit made on his behalf. It might as well be contended that the testimony of a witness at *Nisi Prius* is admissible evidence, on any future occasion, against the party who called him.

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In *Chambers v. Bernasconi* (a), where the act of bankruptcy was in issue, and the place was material, the Court decided that depositions of deceased witnesses, taken before the commissioners on the opening of the commission and enrolled by the assignees, were not evidence against the latter. In *Atkins v. Humphreys* (b) the plaintiff was not permitted to put in evidence a deposition, made by a witness in a suit in Chancery between the defendant and a third party and used by the defendant on that occasion, for the purpose of proving a fact mentioned in such deposition. In *Brickell v. Hulse* (c) a distinction was taken between a deposition in equity (which this resembles) and an affidavit. There might have been two depositions taken in proof of the bankruptcy, and they might have been contradictory: which of them would then be evidence? *Hay* was neither director nor shareholder, but a mere witness tendered by the bank and examined orally, whose testimony was taken down by the proper authority. No more use was made by the defendants of

(a) 1 C. M. & R. 347. S. C. 4 Tyrwh. 531.

(b) 1 M. & Rob. 523.

(c) 7 A. & E. 454.

his

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his statements, than was made of the depositions which were held inadmissible in *Chambers v. Bernasconi* (a).

LORD DENMAN C. J. The examination or deposition of *Hay* was clearly admissible evidence. The defendants send their servant to prove an act of bankruptcy; and they act on the statement made by him. There is no necessity for entering into the general doctrine. No doubt a party in a cause is not bound by all that his witnesses say at *Nisi Prius*, or in their depositions in Chancery. But the defendants are here bound by the particular statement which their agent was sent to make.

LITLEDALE J. The deposition is evidence as much as if it had been made by the defendants themselves. They sent him for the purpose of making it, and he adopted it.

PATTESON J. The distinction pointed out in *Brick v. Hulse* (b) is a sound one, and I do not intend to depart from it; but it is not material by what name the document is called. It is in substance an affidavit within the meaning of the distinction there laid down, though called a deposition. *Hay* therein makes a statement of facts, which the petitioning creditors had previously ascertained from him that he was able to make. He says nothing but what they knew he would say, and was subject to no cross-examination. *Chambers v. Bernasconi* (a) is not in point. The depositions were

(a) 1 C. M. & R. 347. S. C. 4 Tyrwh. 531.

(b) 7 A. & E. 454.

there

re offered against the assignees, and not, as here,
inst the petitioning creditor.

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WILLIAMS J. The solicitor of the defendants is employed by them to obtain evidence of a certain fact in order to support a fiat. For that purpose he produces a deponent, who swears to the specific fact which he is expressly called to prove. Under such circumstances, the affidavit is like one made by the principal, and is admissible by the same rule. The question, too, is *what* it proves, but whether, upon this record, it is admissible at all.

Rule discharged.

1839.

Wednesday,
June 5th.

TREWHITT *against* LAMBERT.

A witness, produced to prove a parol demise from plaintiff to defendant, stated that, at the time of making it, plaintiff looked at written minutes, from which he appeared to read the terms, to which defendant assented. Held that, in the absence of any further proof respecting the nature of the minutes, parol evidence of the terms of the demise were admissible.

ASSUMPSIT on an agreement for repairing premises, whereof defendant was tenant to the plaintiff. Plea, non assumpsit. At the trial before *Coleridge J.*, at the sittings at *Westminster* in this term, a clerk of the plaintiff was called to prove the agreement. The witness had been present at the making of the agreement; upon which occasion the plaintiff read to the defendant the terms of the agreement from some writing held in his hand at the time. It was not proved what the writing was; nor was it shewn to the defendant, or signed by him. The defendant assented to the terms: and shortly afterwards the witness wrote down the terms in a book, which he produced in court, and by which he refreshed his memory after trial. It was objected, on the part of the defendant, that the writing ought to be produced. The learned Judge over-ruled the objection; and the jury found for the plaintiff. In this term (a).

Ball moved for a new trial, on the ground that the agreement was in writing, and that parol evidence of it was therefore inadmissible. He distinguished *Doe dem. Bingham v. Cartwright* (b) from the present case by the circumstance that the memorandum must here have contained the terms, not of a mere proposal, but of an accepted agreement. *Rex v. Wrangle* (c) was also referred to.

Cur. adv. vult.

(a) *May* 31st. Before Lord *Denman C. J.*, *Littledale, Patteson*, and *Williams J.*s.

(b) 3 B. & Ald. 326.

(c) 2 A. & E. 514.

Lord

Lord DENMAN C. J. now delivered the judgment of the Court.

This was a motion for a new trial on account of the admission of parol evidence of a lease, which in fact was written. The fact was, that the plaintiff had taken down in pencil writing some minutes of the letting, and read them over to the defendant, who agreed to them. They were afterwards entered in a book by the witness, who, having been present at the discourse, refreshed his memory by the book. It was said that the original minutes ought to have been produced. But there was no proof what these minutes were: the plaintiff had never said that they constituted the lease: it was proved only that the plaintiff looked upon a paper, and appeared to call over from it the terms of the intended lease. It might have been all in cyphers and shorthand for his own use, in no legible form. There was nothing shewn to have ever existed that would have conveyed any information to the Court or jury.

Rule refused.

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Thursday,
June 6th.

SANDYS *against* HODGSON.

Defendant brought trover against *D.* for a dog, and obtained a verdict for 50*l.* damages, subject to be reduced to 1*s.* on the delivery of the dog to defendant. By plaintiff's authority *D.* delivered the dog to defendant, at the same time demanding it back on behalf of plaintiff, as his property, at a time named. Afterwards, at the time named, plaintiff demanded the dog, and defendant refused to deliver it.

Plaintiff brought trover; defendant traversed plaintiff's property, and also pleaded Not guilty, and Leave and licence. Plaintiff new assigned to the plea of Leave and licence; to which defendant pleaded Not guilty, and Leave and licence; to which last plea plaintiff replied *de injuriâ*.

Held, that plaintiff was not precluded from proving his title by having authorised the delivery; and that, on proof of title, he was entitled to a verdict on all the above issues.

TROVER for a dog.

Pleas. 1. That the dog was not the property of the plaintiff. 2. Not guilty. 3. That the defendant converted by the leave and licence of the plaintiff.

The replication joined issue on the first and second pleas, and, as to the third, new assigned a fresh conversion.

To the new assignment the plaintiff pleaded, 1st, Not guilty; 2d, Leave and licence.

On the first of these pleas the plaintiff joined issue, and to the second replied *de injuriâ*.

On the trial before *Coltman J.*, at the Summer *Lancaster* assizes 1837, the following facts appeared. At the *Lancaster* Spring assizes 1837, the defendant brought two actions of trover for the same dog, which was the subject of the present action, one against a person named *Dowbiggen*, the other against the present plaintiff. The defendants in each of these actions traversed *Hodgson's* property. *Hodgson v. Dowbiggen* was tried first, and a verdict given for the then plaintiff *Hodgson*, damages 50*l.*, to be reduced to 1*s.* if the dog should be delivered up to *Hodgson* before the fourth day of the following term. Afterwards *Hodgson v. Sandys* was tried; but, *Sandys* calling *Dowbiggen* as a witness, a verdict was found for the defendant on the plea denying *Hodgson's* property. Before the day named for the

delivery

ary of the dog, *Dowbiggen*, and the attorney who conducted the defences in each cause, brought the (with a shilling) to *Hodgson*, and offered it to him, giving him at the same time a written notice demanding the dog as *Sandys's* property, and on his behalf, and requiring that they should call for it at a time named. *Hodgson* received the dog; and the attorney called for the time appointed, and demanded it; but *Hodgson* refused to give it up. On the trial of the present action the plaintiff gave evidence of his title to the dog, and produced the record of the former action of *Hodgson v. Sandys*; and the defendant produced the record of *Hodgson v. Dowbiggen*; and it was shewn that *Dowbiggen* and the attorney had acted by the plaintiff's authority. For the defendant it was contended that the plaintiff had precluded himself from setting up his title in this action; that no conversion was proved which was not justified by the leave and licence first pleaded and admitted by the plaintiff. Verdict for plaintiff, with leave for the defendant to move for a nonsuit.

At Michaelmas term 1837, *Joseph Addison* obtained a writ for a new trial or a nonsuit (*a*).

James Well and *Alexander* now shewed cause. First, there is no ground for arguing that the evidence of conversion, furnished by the refusal of the defendant to deliver the dog, is met by what took place before. Independently of the plaintiff's consent, the fact is clearly that *Dowbiggen* gave up to the defendant possession of that which belonged to the plaintiff. So far therefore the defendant gained no title except as against *Dowbiggen*; and the plaintiff was entitled to sue. Then,

And so for reduction of damages; but on this there was no decision.

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as to the plaintiff's conduct, there is nothing to divest him of his title. There is no estoppel by record; and, as to the plaintiff's consent, he merely allows *Dowbiggen* to satisfy the condition of the former verdict, by giving up, as between *Dowbiggen* and the defendant, the possession, which, as between those two, *Dowbiggen* was not entitled to retain. But this was not, either in form or fact, an abandonment of the plaintiff's right to assert his title against the defendant. If the defendant was not satisfied with the delivery on these terms, of which he was cognisant from the written notice, he should have refused to receive the dog.

Secondly, there is nothing in this record to vary the above view. The conversion by leave and licence took place when possession of the dog was delivered by *Dowbiggen* to the defendant. Taking property of another, by assignment from a party who has no authority to dispose of it, is a conversion; *M'Combie v. Davies* (a). That took place here by leave and licence, which justifies the conversion, but does not prevent the transaction from being a conversion. If the defendant meant to contend that it did, he should have taken issue on the conversion, and have given the leave and licence in evidence. Then afterwards, by the defendant's refusal to redeliver, the conversion took place which is now assigned. This satisfies the rule laid down in note (6) to *Greene v. Jones* (b), that two trespasses must be proved where there is a new assignment.

Joseph Addison and *W. H. Watson*, contra. The plaintiff first treats the defendant as the owner of the

(a) 6 East, 538.

(b) 1 Wm. Saund. 299 a.

dog,

g, and then claims it as his own. [*Patteson J.* He treats the defendant as entitled to the possession as between the two, *Dowbiggen* and the defendant. Why is that inconsistent with claiming the property as against the defendant? If a party comes in to defend an ejectment, and is personally estopped as against the plaintiff, and a verdict passes for plaintiff, the tenant in possession may give up possession, and then sue the lessor of the plaintiff.] Here the plaintiff has been a party to a fraudulent delivery, for the purpose of defeating the defendant's claim. The Court will not allow him now to avail himself of the title which he has fraudulently held back: 3 *Bac. Abr.* 774, &c. (7th ed.), *Fraud* (B.); *Nare v. The Earl of Bedford* (a); *Cockshott v. Bennett* (b); *Leicester v. Rose* (c); *Jackson v. Duchaire* (d); *Goodale v. Wyat* (e). In *Co. Lit.* 357. b. it is said, "So it is in all cases where a man hath a rightful and just cause of action; yet if he of covin and consent do raise up a tenant by wrong against whom he may recover, the covin doth suffocate the right, so as the recovery, though it be upon a good title, shall not bind or restore the demandant to his right." [Lord *Denman C. J.* What does the fraud consist in? In allowing the defendant to take the dog, or in getting the damages reduced?] In giving a delusive possession, the defendant being entitled, either to the full damages, or to a bonâ fide surrender of the property. It is an acknowledged principle, that a party, who aids a transaction in which a state of facts is taken for granted on all sides, shall not afterwards be allowed to deny those facts, however the truth may be: *Pickard v. Sears* (g).

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(a) Cited in *Hunsden v. Cheyney*, 2 *Vern.* 151. (b) 2 *T. R.* 763.

(c) 4 *East*, 372. (d) 3 *T. R.* 551. (e) *Poph.* 99.

(g) 6 *A. & E.* 469. See *Gregg v. Wells*, *antè*, p. 90.

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Then, as to the new assignment, no second conversion was proved. The dog being delivered up to the defendant by the plaintiff's consent, there was no conversion in afterwards refusing to redeliver.

Cur. adv. vult.

Lord DENMAN C. J. afterwards, in this term (*June 11th*), delivered the judgment of the Court. After stating the facts, his Lordship proceeded as follows.

On the trial it was contended that *Sandys's* conduct precluded him from setting up any claim of property in the dog, as it plainly led *Hodgson* to believe it his (*Hodgson's*) property. And recourse was had to the principle lately expounded in *Pickard v. Sears (a)*, which runs through many cases in equity, and is thus stated by *Sugden (3 Vend. & Purch. 428. (b))*:—"If a person having a right to an estate permit or encourage a purchaser to buy it of an another, the purchaser shall hold it against the person who has the right."

But we cannot apply that doctrine to the case before us; because we do not perceive how *Sandys* induced *Hodgson* to become the purchaser of the dog. For, in the first place, he did not become the purchaser, but only established a right of action against *Dombiggen* as a wrong doer; and, secondly, *Sandys* cannot be said to have persuaded him that he admitted his title, having himself so lately claimed to hold the dog against him.

If, indeed, it had been proved that *Hodgson* was induced by *Sandys's* conduct to enter into a disadvantageous compromise of the action, there might have been some difference. But we do not know that it was such. *Hodg-*

(a) 6 A. & E. 469.

(b) 10th ed.

on may have entitled himself to recover the dog against *Dowbiggen*; and it would then be just to enter a verdict for what may be the whole amount of the damages laid in the declaration, called penal damages, to compel restitution: but the fact of conversion may have entitled *Hodgson* to no more damages than the 1s. actually paid. And this arrangement between them, as far as appears, was wholly independent of the question of property as between *Sandys* and *Hodgson*. For, though *Sandys* may have claimed through *Dowbiggen*, there is no inconsistency in supposing that *Dowbiggen* was in such a position towards *Hodgson* as to have no defence against him, and yet that *Sandys* was entitled as owner to recover it from *Hodgson*.

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against
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Rule discharged.

JACKSON *against* HILL.

Thursday,
June 6th.

DEBT for an escape. The declaration, after averring that the liberty of *Pickering Lythe*, in the county of *York*, is an ancient liberty with return of writs, and that defendant, at the several times when &c., was chief bailiff of the liberty of *P.*, or his deputy, to take *W. T.*, if found in his liberty &c. The instrument produced in proof of the averment was in the form of a common sheriff's warrant, and was addressed by the sheriff to the keeper of the county gaol, "the chief bailiff of *P.*, his deputies, and *J. D.*, my bailiffs," and commanded them, jointly and severally, to take *W. T.*, if found "in my bailiwick," &c., "that I may have the bodies" &c. The deputy of the defendant thereupon arrested and conveyed *W. T.* to the county gaol out of the liberty:

Held, that the averment was not proved; for that the precept was not a mandate to defendant as bailiff of a liberty, but a warrant to him as sheriff's bailiff, and acted upon as such; though it was shewn that defendant, when ruled by plaintiff to return "the mandate," had obtained time to do so, and had not then set it up as a common warrant.

Per *Patteson J.* A bailiff of a liberty, when addressed in the mandate as the sheriff's bailiff, may waive his franchise and act upon it in the latter character.

In such an action the plaintiff is not estopped by the sheriff's return of *cepi corpus* to the writ of *ca. sa.*

K k 2

thereof,

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thereof, recited a judgment in the Court of King's Bench recovered by plaintiff against *W. Taylor* and *W. Taylor* the younger, for 98*l.* debt and costs. That plaintiff thereupon sued out a ca. sa. directed to the sheriff of *Yorkshire*, and duly indorsed and delivered it to him. That the sheriff thereupon, by his mandate duly made in writing under his hand and seal of office, and directed to defendant, as chief bailiff of the said liberty, or his deputy, required him to take the said *W. T.* and *W. T. jun.* if they should be found in his liberty, and them safely keep, so that he (the sheriff) might have their bodies &c.; which mandate was delivered to defendant to be executed in due form of law. That defendant, by virtue of such writ and mandate, as chief bailiff &c., took and arrested the said *W. T.* and *W. T. jun.* within the liberty, and then, by virtue of the said writ and mandate, kept and detained them in his custody in execution at the suit of plaintiff from thence until defendant, being such chief bailiff, afterwards, towit on &c., without the leave or licence and against the will of the plaintiff, suffered and permitted them to escape out of his custody; and the said *W. T.* and *W. T. jun.* did escape and go at large wheresoever they would, and out of the said liberty, the plaintiff then and still being unsatisfied. Whereby an action hath accrued &c.

Pleas. 1. That the liberty of *Pickering Lythe* is not an ancient liberty with return of writs, in manner and form &c. 2. That the sheriff did not by his mandate in writing &c., directed to defendant as chief bailiff of the said liberty, or his deputy, require defendant to take the said *W. T.* and *W. T. jun.* &c., in manner and form &c.

3. That

3. That the mandate was not delivered to defendant to be executed &c., in manner and form &c. 4. That defendant did not, by virtue of the said writ and mandate, take or arrest *W. T. jun.*, in manner and form &c. 5. That *W. T.* and *W. T. jun.* did not escape or go out of the custody of defendant, or go at large, in manner and form &c. 6. That there is not, nor ever was, within the said liberty any gaol for the custody of prisoners arrested within the liberty by virtue of any mandate directed to the chief bailiff by the sheriff of *Yorkshire*, and that from time immemorial the chief bailiff has been used to convey all prisoners so arrested to the castle of *York*, out of the liberty, and there deliver them to the custody of the sheriff, and the sheriff has been used to keep all prisoners so delivered. That defendant, having arrested the *Taylors* under the writ and mandate, conveyed them by the nearest and most convenient way out of the liberty, in and through the county of *York* and the county of the city of *York*, to the said castle, and then delivered them to the said sheriff &c.; and that the said conveyance out of the liberty is the same escape whereof the plaintiff has complained. Verification. 7. That plaintiff ought not further to be admitted or received to plead the said declaration by him above pleaded, as to so much thereof wherein plaintiff alleges that, by virtue of the writ and mandate in the declaration mentioned, defendant, as chief bailiff of the liberty of *Pickering Lythe*, took and arrested the said *W. T.* and *W. T.* the younger, and then, by virtue of the said writ and mandate, kept and detained them in his custody in execution at the suit of plaintiff, because he says that, after the commencement

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of this suit, and before the day of pleading this plea, at the return of the said writ, towit on the 11th *June* 1836, the said sheriff duly returned the said writ in the declaration mentioned to the court of our said Lord the King at *Westminster*, and then and there returned thereon that by virtue thereof he, the said sheriff, had taken the said *W. T.* and *W. T.* the younger, whose bodies he had ready at the time and place in the said writ contained, as by the said writ he was commanded, as by the record of the said writ and of the return thereof remaining &c. more fully appears. Verification by the record, and prayer of judgment if the plaintiff ought further to be admitted or received &c. (as in the introductory part of the plea). 8. That defendant, as chief bailiff of the said liberty, had not the execution and return of all writs to be executed within the limits of the liberty &c.

Replications. — As to the first, second, third, fourth, fifth, and eighth pleas, similiter : issue joined. — As to the sixth plea, that there was a gaol within the liberty which had become dilapidated and in decay, and that the chief bailiff was bound to keep all such prisoners in safe custody within his liberty ; with a special traverse of the immemorial usage stated in the plea, &c. : conclusion to the country : issue thereon. — As to the seventh plea, demurrer, alleging for causes that the plea neither traversed, nor confessed and avoided, the matter in the declaration ; that the matter pleaded as an estoppel could not be set up as such to the taking and arrest, or the cause of action mentioned in the declaration ; that, the cause of action being against defendant for an escape, the plaintiff's being estopped

estopped from alleging that defendant took and arrested the *Taylors* could not constitute any answer; that the plea was an argumentative traverse, and bad for repugnancy, because, if defendant was guilty of an escape (which the plea admits), he must have arrested the *Taylors*; that the sheriff's return, admitting it to be conclusive, cannot alter the liabilities of the parties at the commencement of the action; and that the plea alleged a return by the sheriff at the return day of the writ, whereas there is no return day in the said writ Joinder.

The trial of the issues came on at the *York* Summer assizes 1837, before *Parke* B., when a verdict was found for the plaintiff on the first and eighth pleas; and for the defendant on the second, third, fourth, and fifth pleas, subject to the opinion of this Court on the question, whether a certain document put in evidence answered the description of a mandate by the sheriff to the defendant, as stated in the declaration. The jury were discharged from finding a verdict upon the issue on the sixth plea.

The writ of *ca. sa.*, issued to the sheriff, contained no clause of *non omittas*. Upon receipt of it, the sheriff sent to the defendant by post the following document under his seal of office, addressed to "The chief bailiff of *Pickering Lythe*."

"*Yorkshire* towit. *N. E. YARBURGH* Esq., sheriff of the county aforesaid, to the keeper of the gaol of the said county, and also to the chief bailiff of the liberty of *Pickering Lythe*, his deputies, and *Job Doe*, my bailiffs, greeting. By virtue of a writ of our Sovereign Lord the King to me directed, I command you and every of you

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jointly and severally that you take, or one of you take, *William Taylor* and *William Taylor* the younger, if they shall be found in my bailiwick, and them safely keep, so that I may have their bodies before our Sovereign Lord the King at *Westminster*, immediately after the execution hereof, to satisfy *David Jackson*, as well a certain debt of 5*l.*, which he lately in the King's Court before the King at *Westminster* recovered against the said *William Taylor* and *William Taylor* the younger, as also 4*l.* which in the said court were awarded to the said *David Jackson* for his damages which he had sustained, as well on occasion of the detention of the said debt as for his costs and charges by him about his suit in that behalf laid out, whereof the said *W. Taylor* and *W. Taylor* the younger are convicted. Hereof fail not as you will answer at your peril. Given under the seal of my office the 16th *April* 1836."

"By the sheriff." (L. s.)

"You are hereby required not to discharge the defendant without order from the said sheriff."

There was also a memorandum, upon the above, of the description and residence of the *Taylors*, the sum to be taken under the writ, and the name and address of the plaintiff's attorney, as endorsed on the ca. sa.

The arrest was made by the deputy of the chief bailiff, who conveyed the prisoners to the county gaol at *York*, out of the liberty. The plaintiff had, since the commencement of this action for an escape, ruled the sheriff to return the writ; and also the defendant, the chief bailiff, to return the sheriff's mandate to him. Both had obtained further time to make their returns. The sheriff afterwards returned cepi &c.; and the chief bailiff (the now defendant)

defendant) thereupon applied to this Court to discharge the rule obtained against himself; which was accordingly done (a).

On the following *Michaelmas* term, *Atcherley* Serjt. moved to enter a verdict for the plaintiff instead of the defendant, on the point reserved at the trial.

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Cresswell and *Wightman* now shewed cause. This is no mandate to the defendant as bailiff of a liberty, but a mere warrant by the sheriff to the defendant as *his* bailiff to arrest the *Taylors* within the sheriff's bailiwick. Under this warrant the defendant might have arrested any where in the county. As bailiff of a liberty he could have arrested only within the liberty. It directs the defendant to keep the prisoners "so that *I* may have their bodies;" whereas the ordinary mandate to the bailiff of a liberty is to take "that *you* may have his body" &c.; *Ritson's Office of Bailiff of a Liberty*, p. 76. (Appendix). The fact, that the defendant is addressed as "chief bailiff of the liberty," is immaterial, and mere description. It is not a mandate to him *as such*. This distinction is like that between a writ against a defendant *as* administrator, and one only describing him so. It is said that an arrest by the sheriff's bailiff within the liberty would be unlawful, and that the defendant must therefore be presumed to have acted legally in his character of bailiff of the liberty. The answer is, that the liberty is within the sheriff's bailiwick, and that the arrest by him within the franchise is good, though it may expose him to an action at the suit of the lord of the liberty; *Villa de Darby v.*

(a) See *Jackson v. Taylor*, 5 Dowl. P. C. 140.

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Foxley (a). Nor is the arrest objectionable even on that ground, if the lord, or his bailiff, waive his franchise by consenting to arrest under the warrant of the sheriff as his bailiff. That the franchise may be waived appears from *Munday v. Frogat (b)*, where the bailiff of the liberty of the *High Peak* took a bail bond in the sheriff's name, which was held good, the bailiff having thereby waived his franchise, and there being no gaol in the liberty. There is an *Anonymous* case in *March (c)* which also shews that the sheriff may address his warrant to the bailiff of a liberty as "his bailiff." Indeed the bailiff of a franchise is no more than a special bailiff of the sheriff, and was so considered by Lord *Ellenborough* C. J. in *Grant v. Bagge (d)*. [*Patteson* J. The instrument is addressed to the chief bailiff and "his deputies;" now the sheriff's bailiff cannot make a deputy; it may, therefore, be argued that the sheriff must have meant to treat the defendant as the officer of the franchise, and not as his own bailiff.] No such inference would be legitimate; for it is also addressed to the keeper of the county gaol, who could not, as such, arrest at all. Then it is said that the bailiff, when ruled to return the mandate, applied for time, and thereby admitted the nature of it, and his liability to make a return to it, as such mandate. But this is no estoppel; or, if it is, it may be argued that the plaintiff has equally estopped himself by treating the arrest as one made by the sheriff, and compelling him to return *cepi corpus*, by which it, at all events, appears that the sheriff considered the arrest to have been made

(a) 1 *Rol. Rep.* 119.(b) 3 *Kebl.* 71, 117, 125.(c) *March's Reports or New Cases*, ed. 1675. p. 25.(d) 3 *East*, 128. See *ib.* p. 140.

by

by himself, and in his own bailiwick. The precept cannot be both warrant and mandate; it must be one or the other, and, upon the whole, it must be taken to be the former. *Boothman v. The Earl of Surrey* (a) is the case that has probably induced the plaintiff to try this experiment: but there it appeared that there was a gaol within the liberty; the precept was directed to the chief bailiff and his deputies only; and the sheriff clearly treated him as such throughout the proceedings (b). [*Patteson J.* referred to the note in *Ritson's Office*

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(a) 2 T. R. 5.

(b) A copy of the form of mandate used in *Boothman v. The Earl of Surrey* was produced at the desire of the Court. It was as follows. "Yorkshire, to wit. Sir Thomas Turner Slingsby, Bart., sheriff of the said county, to the chief bailiff of the liberty of Hallamshire and his deputies, greeting. Whereas his Majesty lately commanded the sheriff of Yorkshire that he should cause to be levied of the goods and chattels in his bailiwick of John Woolhouse, otherwise Wollas, 37l., which in his said Majesty's Court before his said Majesty at Westminster were awarded to Sarah Boothman for her damages, which she sustained by reason of not performing certain promises and undertakings made by the said John to the said Sarah at Leeds in my county, and that he should have that money before his said Majesty at Westminster at a certain day now past, to render to the said Sarah for her said damages, whereof the said John was convicted, as appeared to his said Majesty on record, and the said sheriff on that day returned to his said Majesty that, for the execution of the said writ to him directed, he commanded the chief bailiff of the liberty of Hallamshire in his county, who had the full execution of all writs, precepts, and process to be executed in that liberty and the return thereof, and to whom the execution of the said writ wholly belonged, inasmuch as he could not execute the same in his county out of the said liberty, which said chief bailiff, to wit The Right Honorable Charles Howard, commonly called the Earl of Surrey, had answered and returned to the said sheriff's precept to him directed in the words following, endorsed on a copy of the said precept, (that is to say,) 'I have caused the within execution to be executed, and have levied of the goods and chattels of the within mentioned defendant, lying within my bailiwick, the sum of 37l. 13s. 2d. and no more, the said defendant having nothing more within my bailiwick whereupon I could raise the within mentioned sum of 37l. as within I am directed. Dated this 14th January 1783. Surrey.' Therefore, by virtue of his said Majesty's

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Office of Bailiff of a Liberty, p. 14., which mentions the practice of directing the sheriff's warrant as well to the bailiff of the liberty as to one or more of his own bailiffs, and thereby avoiding the necessity of a non omittas clause.]

Atcherley Serjt., Knowles, and W. H. Watson, contra. The instrument is a mandate, and pursues the usual form of such mandates. [Copies of several mandates by sheriffs to the bailiffs of this and other liberties were produced from the files of this Court; but the Court observed that none of the bailiffs were addressed by the sheriff as "my bailiffs."] It is addressed to the chief bailiff, as such. It names "his deputies," which would be improper if it were the case of a common bailiff, who cannot have a deputy, but only an assistant. If the deputy of the chief bailiff be intended, then the arrest, which, in fact, was made by the deputy, was regular. [*Patteson J.* The defendant may say that the warrant makes all his deputies to be also the sheriff's bailiffs for this purpose.] A general address of that kind is not enough. The name of the bailiff should be mentioned in the warrant. *Housin v. Barrow (a)* shews the necessity of this, where a warrant to *M.* "and all the others of the sheriff's officers" was adjudged bad. [*Little-dale J.* There may be known deputies within the fran-

jesty's writs to me directed, reciting as or to the effect aforesaid, I command you and every of you, that ye, some or one of you, take the said *John*, if and so forth, and him safely keep, so that I may have his body before his said Majesty at *Westminster* on *Wednesday* next after one month of *Easter*, to satisfy the said *Sarah* for 3*l.* 6*s.* 10*d.* the residue of the damages aforesaid; and this and so forth. Given under the seal of my office" &c.

(a) 6 T. R. 122.

chise ;

chise; and the sheriff may make them his bailiffs without further describing them.] The presumption, as against the defendant, is that he acted as officer of the liberty; for in that character he applied to this Court, and obtained time to make his return. [*Patteson J.* He seems to have treated it as a warrant; for he hands the prisoner over to the county gaol.] There was an issue on a custom to do this, and on the existence of a local gaol. It cannot be presumed that the sheriff would direct his own bailiff to disturb the defendant's franchise, or direct the defendant's deputies to do so, by an act which would entitle the sheriff to the fees. The instrument has a double aspect. It may operate as a mandate or a warrant at election; or it may operate, distributively, as both; authorising the defendant or his deputy to take within the liberty, and the gaoler to receive and keep the prisoner when so taken. Such a mode of construction is justified by *Blatcher v. Kemp* (a). The addition of the words "my bailiffs," and "my bailiwick," is not repugnant to this construction; for it is admitted on the other side that the liberty is within the sheriff's bailiwick: and *Dalton's Office of Sheriffs* (b), *Grant v. Bagge* (c), and the argument in *Wentworth v. Broadwater* (d), are authorities to shew that the bailiff of a liberty is, in effect, the servant or bailiff of the sheriff. The mandate, therefore, only describes the defendant according to the legal effect; that is, as one of the sheriff's bailiffs. [*Patteson J. Ritson* does not approve of that doctrine (e).] In *Platel*

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(a) Note to *Wallace v. King*, 1 H. Bl. 15.

(b) Ch. 89. p. 181. ed. 1700.

(c) 3 East, 128.

(d) *Skinner*, 413.(e) See *Ritson's Office of Bailiff of a Liberty*, note, p. 8.; p. 16.; note, p. 24.; note, p. 75.

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v. Dowse (a) a warrant to levy, in the ordinary form of a sheriff's warrant, was so addressed by the sheriff to one who was the deputy bailiff of a liberty: upon receipt of the warrant, the deputy acted upon it as if it had been a mandate to his principal; and, by direction of the chief bailiff, paid the money to the assignees of the judgment debtor, who had become bankrupt: and it was held that the chief bailiff could not afterwards refuse to return the mandate on the ground that it was a warrant, and not a mandate. The case is in point, and is, in fact, a stronger one than the present; for the instrument here is, at least, ambiguous (b); and the defendant has given proofs more unequivocal than were given in *Platel v. Dowse* (a) that he regarded it as a mandate. The case of *Munday v. Frogat* (c) is obscurely reported, and is entitled to little weight, and is moreover distinguishable; for the defendant here is attempting to waive the franchise for his own benefit, whereas there the party waived his privilege to the detriment of no one but himself.

By the direction of the Court, the demurrer to the seventh plea was now argued.

W. H. Watson, for the plaintiff. There is no precedent of a plea of estoppel on matter arising since the commencement of the action. [*Littledale J.* Why should it not be as good as if pleaded at first?] It is no estoppel at all in this action. The rule is

(a) 4 *New Ca.* 204.

(b) It was noticed by the Court, in the course of the argument, that a printed form of a common sheriff's warrant had been used, a non omittas clause having been erased, and the address to the chief bailiff, and his deputies, inserted.

(c) 3 *Keb.* 71, 117, 125.

thus

thus laid down in *Dalton's Office of Sheriffs* (a): A man may not have a direct averment against the return of the sheriff in the same action; but, in another action, he may; as in debt against the bailiff of a franchise for an escape of one; return of the sheriff that he had taken him by a warrant directed to him (the bailiff) on a ca. sa.; it may be averred that no such warrant was directed to him; and for this he cites *Yearb. Pasch. 15 Ed. 4. f. 1. B. pl. 8.* So in *Parkes v. Mosse* (b), where trover was brought by an executor against a sheriff's bailiff, who had taken goods of the testator under a fi. fa., it was held that the defendant might shew the taking and the delivery over to the sheriff, and was not estopped by a return of the sheriff excusing himself for not executing the writ. The return of the sheriff may be primâ facie evidence, even between strangers to it; *Gyfford v. Woodgate* (c): but it is not an estoppel even against himself in another action, as in case for not levying; *Brydges v. Walford* (d). If it be an estoppel, it must be reciprocal; yet these cases shew that the defendant is not estopped by it. As to the special ground of demurrer, the plea states a return day of the writ, whereas the writ of execution was returnable, not on a certain day, but immediately.

Wightman, contra. The return of a sheriff is "of such high regard," that no averment is admitted against it, *Com. Dig. Return*, (G). In *Harrington v. Taylor* (e) the plaintiff, in reply to a plea of the Statute of Limitations, stated process sued out within six years and

(a) Ch. 42. p. 191. ed. 1700. (b) *Cro. Elix.* 181. S. C. 1 *Leon.* 144.

(c) 11 *East*, 297.

(d) 6 *M. & S.* 42.

(e) 15 *East*, 378. The rejoinder was there objected to, because it concluded to the country, and amounted to a plea of nul tiel record.

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duly returned and continued, to which the defendant rejoined that the process was not returned: it was admitted by the counsel for the defendant that the rejoinder was bad, as no averment could be made against the return. The return of a rescue is conclusive on the party, even on an indictment (a). The only remedy is an action for damages against the sheriff for the false return. The sheriff takes by the hands of the defendant, and returns that he has the prisoners in custody; the plaintiff alleges that the defendant took them, and then let them go out of the liberty. He does not allege that the escape was within the liberty. The declaration and the return as pleaded, taken together, shew that the escape complained of was the delivery to the sheriff, which is no good cause of action. [*Patteson J.* The allegation is, that the defendant suffered them to escape, and that they did escape, and go at large "wheresoever they would."] *Boothman v. The Earl of Surry* (b) was new law. There was no instance of such an action before; and the principle of it is questionable. At all events it is inapplicable to this case. The bailiff there had a gaol within the liberty; here no such gaol is shewn to exist. The defendant is therefore directed, and is obliged, to deliver the prisoners to the sheriff, that *he* (the sheriff) may have their bodies &c. He cannot be sued for doing that which he is compelled by law to do.

Watson, in reply. In the cases in *Comyn*, where averments were not permitted against the return, the point

(a) But see Lord *Ellenborough* in *Gyfford v. Woodgate*, 11 *East*, 299.

(b) 2 *T. R.* 5. See *Ritson's Office of Bailiff of a Liberty*, p. 23, 24. n. who refers to *Appleton v. Burr*, *Cro. El.* 158, 289., cited also *Cro. Jac.* 242.

arose

arose in the same action as that in which the return was made. Upon any other construction of the rule there could not be an action for a false return. The return is conclusive only in the progress of the same cause, or for the purposes of an attachment; in other cases it is evidence only. The duty of a bailiff, where there is no prison in his liberty, is to keep the prisoners safely until delivered by due course of law. If there is no prison, he must do as the sheriff himself must have done if there had been no county gaol. If the plea is no estoppel, it is idle. It does not even shew that the sheriff has actually taken the debtors, but only that he has *returned* a taking. It seeks to defeat a vested cause of action by the act of a mere stranger.

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Lord DENMAN C. J. It is enough to say that there is no authority so full and direct as to support the doctrine contended for in favour of the 7th plea. I apprehend that such estoppels as this apply only to proceedings in the action in the course of which they arise. As to the rule to enter a verdict for the plaintiff, the question is, whether the sheriff directed a mandate to the defendant. The only plausible argument in favour of the plaintiff arises from the address of the warrant, and the use of the word "deputies" in it. But we must not require so much nicety and exactness in this respect. The document treats the defendant as one of the sheriff's bailiffs, and requires him to make the arrest, not in the defendant's liberty, but in *his*, the sheriff's, bailiwick. It appears, therefore, upon the whole, that it must be taken to be an ordinary warrant.

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LITLEDALE J. The fact stated in the 7th plea is not pleadable as an estoppel. It is quite consistent with the declaration, and is beside it. The declaration states a writ, and an arrest under it by the defendant. Writs of execution being now returnable immediately, the *ca. sa.* was returnable as soon as it was executed. The declaration then states that *afterwards* the defendant suffered the escape. This was a complete cause of action; and the subsequent return of the sheriff, that he had the bodies in his custody, is no answer. Then, as to the other point, the allegation which describes this instrument as a mandate is not supported. Though directed to the defendant as chief bailiff, it calls him, and the other persons addressed, "my bailiff," and commands the arrest, "so that I may have their bodies." It is a warrant to the defendant in the character of general bailiff to the sheriff.

PATTESON J. As to the demurrer, the return is relied upon as conclusive in all cases except on an action for a false return; but this is not so. The Court will so far give credit to it as to act on it in the case of an attachment; but on an indictment it would only be evidence. Who are the parties to this action? It is against the bailiff of the liberty, as such, for suffering the plaintiff's debtor to escape and go at large. The sheriff's return can be no answer to this. He makes a return according to the answer he receives from the bailiff. To make this an estoppel would be to bar an action for an escape by a false statement originating, perhaps, with the bailiff himself. The case cited from the *Yearbook* is strong to shew that a return is conclusive only in the particular cause in which it is made; and

and there is no authority the other way. With respect to the point reserved at the trial, it is difficult to say whether the document is a mandate or warrant. Of the various forms produced from the files of the Court, the earlier ones are addressed to the bailiff of the liberty or his deputies, only. Here it is plain that the common form of a sheriff's warrant has been filled up with the name of the chief bailiff. If intended for a mandate, it should not have directed an arrest to be made in the bailiwick of the sheriff. The allegation in the declaration implies a mandate of limited execution; whereas the document shewn in proof of it is either a general warrant, or is altogether defective and bad. I think that, where the bailiff of a franchise is addressed as an officer or bailiff of the sheriff, he may waive his franchise and act upon the warrant as an ordinary sheriff's officer, as he appears to have done in this case. As to the alleged custom for the chief bailiff to arrest and deliver to the sheriff, we cannot take it into consideration.

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WILLIAMS J. Concurred.

Rule for setting aside the verdict discharged.
Judgment for the plaintiff on the demurrer.

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Friday,
June 7th.

PLEVIN and Another *against* PRINCE.

Before stat.
7 W. 4. &
1 Vict. c. 55.,
the sheriff was
not entitled to
take from a
party arrested
a larger fee,
for detaining
him till bail
given, than the
4d. allowed by
stat. 23 H. 6.
c. 10.

And a she-
riff's officer,
taking more,
was liable to
the penalty
under stat.
32 G. 2. c. 28.
ss. 1, 12.,
though ap-
pointed, by the
plaintiff in the
original cause,
a special
bailiff for
making the
arrest.

DEBT against a sheriff's bailiff for a penalty of 50*l.*,
under stat. 32 G. 2. c. 28. s. 12.

The declaration stated that a *capias* on mesne process issued out of the Exchequer, towit on 18th *January* 1837, against the plaintiffs, directed to the sheriff of *Cheshire*, indorsed for bail for 187*l.* 10*s.*; that the sheriff afterwards, towit 18th *January* 1837, directed his warrant to the defendant, being his bailiff, to be executed; that defendant, towit 19th *January* 1837, arrested the plaintiffs, and, while they were in his custody, towit on the day and year last aforesaid, demanded, took, and received of and from them a certain sum of money, towit 2*l.* 2*s.*, for detaining them under and by virtue of the writ and warrant until after they had given bail to the sheriff; which sum, so demanded, &c., was a greater sum of money than, at the time of the taking or demanding thereof, was by law allowed to be taken or demanded by the defendant of and from the plaintiffs on that occasion, contrary to the form of the statutes &c.

Seventh plea. That defendant did not demand, &c., for detaining, &c., a greater sum of money than, at the time of taking or demanding thereof, was by law allowed to be taken or demanded by the defendant of and from the plaintiffs on that occasion, in manner &c.: conclusion to the country. Issue thereon.

There were also other issues of fact.

On

On the trial before *Alderson B.*, at the *Cheshire Sum-*
assizes, 1837, the arrest, &c., and the demanding
 taking of the 2*l.* 2*s.*, were proved; and it appeared,
 as contended for the defendant, that the defendant
 had been appointed special bailiff to make the arrest by
 the plaintiff in the original action. The counsel for the
 plaintiffs rested their case upon the 2*l.* 2*s.* being a larger
 than was allowed by stat. 23 *H. 6. c. 10.*: the defend-
 ant's counsel contended that the sum was not regulated by
 statute, and that the plaintiffs were bound to give evi-
 dence that the sum was larger than that allowed by law.
 The learned Judge directed a verdict for the plaintiff on
 the issues, reserving leave to move to enter a verdict
 for the defendant on the issue upon the seventh plea.
 At *Michaelmas* term, 1837, *Cottingham* obtained a
 judgment accordingly.

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Velsby and *R. G. Temple* now shewed cause. The
 defendant has taken more than the law allows. Stat.
 7.6. *c. 10.* limits bailiffs of sheriffs to the sum of
 1*l.* for the fees to be taken by them of any person
 arrested or attached. Stat. 32 *G. 2. c. 28. s. 1.* pro-
 hibits sheriffs, bailiffs, or other officer or minister what-
 ever, from demanding or receiving any other or
 greater sum of money "than is or shall be by law
 allowed to be taken or demanded for any arrest or
 bringing, or for detaining, or waiting till the person or
 persons so arrested or in custody shall have given
 appearance or bail;" and sect 12 enacts that any
 sheriff, under-sheriff, bailiff, &c., who shall offend
 against the act, shall forfeit to the party aggrieved
 the sum so demanded. Sects. 5 and 6 provide for the settling and pub-
 lishing the fees to be taken by gaolers: these last

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fees are, however, not applicable to the case of arresting or detaining till bail be given; *Martin v. Bell* (a). There is, therefore, no fee allowable, unless under stat. 23 H. 6. c. 10. (b). It is true that in *Martin v. Bell* (a) it was said that the allowance by the officer of the Court upon taxation was the allowance by the Court, and shewed what was the allowance by law. But there the plaintiff had given evidence that the defendant had taken more than the sum allowed on taxation, which was one guinea; and the Court gave judgment for the plaintiff. The decision, therefore, shews no more than that a bailiff must not take a sum exceeding the sum allowed on taxation; not that he may take as much. In *Martin v. Slade* (c) a plaintiff was nonsuited for not giving evidence that the sum taken exceeded the sum allowed by law, though it appeared that the sum did exceed that allowed by stat. 23 H. 6. c. 10. But in *Dew v. Parsons* (d) it was held that a sheriff was liable to an action for money had and received for all that he had taken, above the 4d.; and *Holroyd J.* said that the allowance of more in taxation might be explained on the supposition that the party, at whose suit the arrest was made, had employed a special bailiff, at an increased expense, which the master had allowed, though the sheriff could not have claimed it. In *Foster v. Blakelock* (e) it was also said that a sheriff could demand no more, though a party employing a special bailiff might be held to contract impliedly for what it was usual to give. In *Innes v. Levi* (g) a sheriff's officer was held liable to the penalty for taking more

(a) 6 M. & S. 220.

(c) 2 New Rep. 59.

(e) 5 B. & C. 328.

(b) See Co. Lit. 368. b.

(d) 2 B. & Ald. 562.

(g) 2 Scott, 189.

than

than the 4*d*. That case is precisely in point. Stat. 23 *H. 6. c. 10.* must have been in force up to the passing of stat. 7 *W. 4. & 1 Vict. c. 55.* (15th *July 1837*); for the latter statute expressly repeals the former, so far as relates to the amount of fees, and provides for another scale.

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Cottingham and *E. V. Williams* contra. Stat. 32 *G. 3. c. 28. s. 12.* is a penal enactment, and will be construed strictly. Stat. 23 *H. 6. c. 10.* does not apply, in words, to fees taken for detaining till bail be given; but the language of stat. 32 *G. 2. c. 28. s. 1.* shews that some fee may be taken for this: the only rule therefore must be, to take that which the Court, by its officer, allows to be proper. In *Martin v. Slade* (a) the decision was, that the party seeking to enforce the penalty must prove what sum was allowed by law, and that the sum named in stat. 23 *H. 6. c. 10.* was not the sum intended by stat. 32 *G. 2. c. 28. s. 12.* Indeed, if that were so, the officer would have been actually out of pocket by the expence of the bail-bond, when a stamp was necessary. In *Martin v. Bell* (b) Lord *Ellenborough* distinctly held that the allowance by the officer of the Court was the proper evidence of the sum allowed by law. There the fee was taken, as here, for detaining till bail was given. In *Innes v. Levi* (c) the fee seems to have been taken for arresting; that case is therefore inapplicable. The dictum in *Foster v. Blakelock* (d) is inapplicable for the same reason. Here, too, it appears that the defendant was a special bailiff; he was, there-

(a) 2 *N. R.* 59.(b) 6 *M. & S.* 220.(c) 2 *Scott*, 189.(d) 5 *B. & C.* 328.

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fore, within the principle laid down by *Holroyd J.* in *Dew v. Parsons (a)*.

Cur. adv. vult.

LORD DENMAN C. J., in the vacation after this term (18th *June*), delivered the judgment of the Court.

This was an action for a penalty against a sheriff's officer for extortion. A verdict was found for the plaintiff, subject to a motion for setting it aside, as to one issue, and entering one for defendant, for a supposed defect in evidence; no proof having been given of the fee lawfully due upon an arrest. The case of *Martin v. Slade (b)* was cited, where Sir *J. Mansfield* and the Court of Common Pleas held that the statute of *Henry VI.* must not be taken as limiting the legal fees. But that must be allowed to be very loose doctrine, and has been rejected by both Lord *Ellenborough* and Lord *Tenterden*, in cases cited on the argument. The former learned judge was indeed supposed to have held, in *Martin v. Bell (c)*, that legal fees must be proved such, by being hung up in the manner prescribed by stat 32 G. 2. c. 28. But that is not the fair import of his language. What he meant was, that, even assuming evidence of the law in that case to be necessary, the habitual allowance of particular fees by the master in taxation furnished that evidence. It does not by any means follow that we want, or ought to require, any other proof than the statute, which was in force when this action was tried, and cannot be repealed by any usage.

In moving for the new trial, it was said that the

(a) 2 B. & Ald. 562.
 (c) 6 M. & S. 220.

(b) 2 N. R. 59.

plaintiff

plaintiff had appointed his own bailiff, and that so the charge might be legal. *Holroyd J.*, in *Dew v. Parsons (a)*, appears to admit that such charge might be allowed; but that was a question as to the officer's right to charge plaintiff's attorney who employed him, possibly, on those terms; nothing was said that could warrant him in extorting an illegal fee from the arrested person.

We therefore think that the rule must be discharged.

Rule discharged.

(a) 2 B. & Ald. 567.

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WILLIAMS *against* BURGESS.

Friday,
June 7th.

ASSUMPSIT. Declaration stated that, in consideration plaintiff would sell and deliver to defendant a mare, which plaintiff supposed to be in foal, for 20*l.*, subject to the condition that, if the mare should prove to be in foal, defendant should, on receiving 12*l.* from plaintiff, return it to plaintiff on request, defendant promised, if it proved in foal and plaintiff paid 12*l.*, to return it. Averment of sale and delivery of the mare for 20*l.*, subject to the above condition; that it proved to be in foal; that plaintiff then tendered to defendant 12*l.* and requested him to return the mare; but defendant refused so to do. Plea, Non assumpsit.

On the trial at the *York* summer assizes 1837, before *Parke B.*, the plaintiff proved a verbal agreement, as
Plaintiff entered into a parol agreement to sell to defendant a mare for 20*l.* subject to the condition that, if it should prove to be in foal, defendant should, on receiving 12*l.* from plaintiff, return it on request. Plaintiff delivered the mare and received 20*l.* On its proving to be in foal, he tendered to defendant 12*l.*, and requested him to return the mare, which defendant refused to do. Held, that the contract to return it on payment of 12*l.* was not a distinct contract of sale, but one of the conditions of the original sale to defendant; and that the delivery of the mare to defendant took the whole agreement out of the Statute of Frauds, 29 C. 2. c. 3. s. 17., so as to enable plaintiff to sue defendant for the refusal to return it.

stated

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stated above, and the acceptance of the mare and payment of the money by the defendant. It was objected, on the part of the defendant, that the agreement on which the action was brought was a distinct agreement for a re-sale of the mare within sect. 17 of the Statute of Frauds, 29 C. 2. c. 3., and ought to have been in writing. But the learned judge, considering it to be merely a qualification of the original contract of sale, which was executed, over-ruled the objection, reserving leave for the defendant to move to enter a nonsuit, and for the plaintiff to object that this defence could not be shewn upon the plea of Non assumpsit. There was a verdict for the plaintiff.

In *Michaelmas* term 1837, *Knowles* obtained a rule nisi to set aside the verdict on the points reserved, and enter a nonsuit.

Alexander now shewed cause. The objection is not open upon the general issue. [Upon this point *Elliott v. Thomas* (a), on section 17 of the Statute of Frauds, and *Buttemere v. Hayes* (b), on the fourth section, were cited (c); but, as the Court pronounced no opinion upon it, the argument is here omitted.] The contract for resale is not a distinct and independent one, but part of the original one, which was made good by acceptance of the mare and payment of the price. That the delivery was sufficient to take the case out of the statute is shewn by many authorities. [*Knowles*, for the defendant, stated that he did not dispute those authorities,

(a) 3 M. & W. 170.

(b) 5 M. & W. 456.

(c) The decisions in the Exchequer were cited in a case of *Eastwood v. Kenyon*, argued in this term (19th June) upon the fourth section; and this Court then intimated its adherence to those decisions.

and

and admitted that the original agreement was made good by delivery.] Then the condition to re-deliver cannot make it void. A state of things, contemplated by the original contract and parcel of it, has arisen, which now entitles the plaintiff to sue without any fresh payment or writing.

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Knowles, contra. There are two distinct contracts; one is executed; the other executory. Both are within the statute; and the latter cannot be enforced, for want of the proper formalities. [Lord *Denman* C. J. Suppose the whole had been in writing at first, would it require two stamps?] Perhaps not; but that is not a proper test. It is certain that an agreement may contain two distinct stipulations capable of being treated as distinct contracts, of which one may be void and the other good; *Wood v. Benson* (a). [Patteson J. I think that, when that case has been cited, the Courts have not been disposed to extend it.] There are two agreements entered into at the same time. Suppose the agreement had stipulated that, in a certain event, the defendant should sell and deliver to the plaintiff another horse, or the foal itself: a writing would then have been necessary; for there would be no acceptance of any thing by the buyer, but only by the defendant, the seller; yet it cannot, in principle, make any difference that the horse to be sold happens to be the same. *Watts v. Friend* (b) is nearly in point. There the agreement was, that the plaintiff should furnish the defendant with seed; that the defendant should sow it on his own land; and should sell and deliver to the plaintiff the

(a) 2 Cr. & J. 94. N. C. 2 Tyrw. 93.

(b) 10 B. & C. 446.

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whole crop of seed produced therefrom. The plaintiff supplied the seed; and the defendant accepted and sowed it, but refused to sell the crop according to the agreement. It was held that, as the agreement was not in writing, the Statute of Frauds was a defence. Yet it might have been urged that the contract required no writing, because there was a delivery of the seed to the defendant.

LORD DENMAN C. J. This is a sale by the plaintiff to the defendant on particular terms, one of which is a return of the article sold in a certain event; the acceptance of the thing sold takes the whole contract out of the statute. The case differs from *Watts v. Friend (a)*, where the re-sale was of a different thing.

LITLEDALE J. The plaintiff is willing to part with his property on certain conditions, which are part of the agreement. It is not an independent contract of sale on which he sues, but the original contract, which was a qualified sale. It is like the case of the delivery of a horse on trial; when the buyer returns it, after trial, it is not a resale. I have not the slightest doubt on the case.

PATTESON J. It is one entire contract, and not two distinct contracts. It is a sale on the terms that the mare and part of the price should be returned in a certain event. If, indeed, the defendant had agreed to sell to the plaintiff the foal, the case might have been different. In *Watts v. Friend (a)* the bargain was to sell to the plaintiff an entirely different thing, and not merely to

(a) 10 B. & C. 446.

return to him the same article. *Wood v. Benson* (a) shews only that there may be two contracts on one piece of paper, of which one may be bad, the other good.

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WILLIAMS J. concurred.

Rule discharged.

(a) 2 Cr. & J. 94. S. C. 2 Tyrw. 93.

SUSANNA HOLMES *against* WILSON and Two Others. Friday, June 7th.

TRESPASS for *breaking and entering* five closes of plaintiff, with force and arms, and, without leave and licence of plaintiff, *keeping and continuing* in and upon the said closes ten erections called buttresses, theretofore without the leave and licence of plaintiff erected by defendants in and upon the said closes, and thereby encumbering the said closes, and preventing plaintiff from having the use and enjoyment thereof.

Plea 1. Not Guilty. 2. That plaintiff heretofore, to-wit on &c., in the Court of King's Bench at *Westminster*, impleaded defendants in an action of trespass, and declared against said defendants in that action for committing the very same trespasses in the declaration in this present suit above mentioned: whereupon defendants then pleaded that plaintiff ought not further to maintain her action, because defendants then brought trespass for such erection, and accepted money paid into court in full satisfaction of the trespass: Held, that, after notice to defendants to remove the buttresses, and a refusal to do so, *A.* might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar.

Trespass is the proper remedy for wrongfully continuing a building on plaintiff's land, for the erection of which plaintiff has already recovered compensation; and a recovery, with satisfaction, for erecting it, does not operate as a purchase of the right to continue such erection.

Therefore, where the trustees of a turnpike road built buttresses to support it on the land of *A.*, and *A.* thereupon sued them and their workmen in

into

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into Court the sum of 25*l.*, ready to be paid to plaintiff, and that plaintiff had not sustained damages to a greater amount &c. : that defendants then paid the said sum into Court : and that plaintiff afterwards took the same out of Court, and taxed her costs in that action : that defendants then paid the said costs ; and plaintiff accepted the said sum, with the costs, in full satisfaction of the causes of action in the said action of trespass complained of, and of all damages and costs occasioned thereby, and proceeded no further in that action. Averment of the identity of the trespasses in the two actions, and verification.

To this last plea the plaintiff newly assigned that she brought her action for other and different trespasses than those complained of in the former action. Plea to the new assignment, Not Guilty.

On the trial at the *Yorkshire* Summer assizes, 1837, before *Parke* B., it appeared that the plaintiff was the owner and occupier of lands, through which a road had been made under the powers of stat. 4 & 5 *W. 4. c. xxxii.* (local and personal, public) (*a*), which prescribes the line of the road and provides that no deviation shall be made in the lands of the plaintiff more to the north than the prescribed line. The defendants (of whom one was a trustee under the act, and the others a contractor and his foreman) raised an embankment, supported by a wall, on that part of the line which passed through the plaintiff's land. The trustees considering it necessary to

(*a*) Entitled, " An Act for repairing and maintaining the road from *Quebec* in the parish of *Leeds* in the West Riding of the county of *York*, to *Homefield Lane End* in the same parish, with a bridge or bridges on the line of such road ; and for making and maintaining certain branch roads to communicate therewith."

give further support to the embankment, the defendants, **for** this purpose, erected certain buttresses upon the **north** side of the wall and of the prescribed line, and **upon** the closes named in the declaration. This was **done** without the plaintiff's consent; and it was admitted **to be** contrary to the provision in the act, which **protected** her land from further deviation on this side.

The plaintiff thereupon commenced an action of trespass against the three present defendants, together with **two** others not named in this action. The declaration **in that** action complained of breaking and entering the **same** five closes, digging up the earth, damaging the **herbage**, encumbering the soil with bricks, mortar, &c., and erecting thereon the buttresses, and keeping and continuing the said bricks, mortar, &c., so placed **thereon**, and the buttresses so erected, for a long space of time, towit &c. The defendants paid 25*l.* into **Court**, which the plaintiff accepted in satisfaction. The **proceedings** in this former action were the subject of **the** plea in the present one.

The former action was brought immediately after the **erection** of the buttresses, on a writ issued 7th *December* 1836.

On the 3d *February* 1837 the money was accepted by **the** plaintiff in satisfaction.

On 9th of *May* 1837 judgment was entered for the **plaintiff**.

On 13th *February* 1837 the plaintiff caused a notice **to be** served on defendants, requiring them, within **twelve** days, to remove the buttresses erected upon her **land**, and giving notice that, if they did not do so, an **action** would be brought for continuing the buttresses on
the

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the land, and further actions from time to time until compliance with the requisition. The trustees, considering that the buttresses were necessary to support the road, and that the former payment by them was an equivalent for the permanent use of the land, refused to remove them. On 27th *April* following, the present action was commenced. It was not shewn that the defendants, or any of them, had entered upon the land of the plaintiff, or had done any act upon it since the trespasses complained of in the first action (a). One of them (the contractor) had entered into an agreement with another of the defendants (the trustee) in 1836 to keep the road in repair for two years. On the part of the defendants it was contended that the action was improperly conceived in trespass; that, by force of the local act and of the General Turnpike Act, 3 G. 4. c. 126. s. 147., the plaintiff was barred of her action after three months from the date of the original trespass; and that the damages recovered in the former action were to be regarded as a full compensation for all injury occasioned by the buttresses, or as a "satisfaction out and out." The learned Baron nonsuited the plaintiff, reserving liberty to move to enter a verdict for her with nominal damages.

In *Michaelmas* term 1837, *Starkie* obtained a rule nisi according to the leave reserved.

Alexander now shewed cause. The proper form of action, if any will lie, is case, and not trespass. In

(a) Upon shewing cause against the rule nisi in this case, it was alleged by the plaintiff's counsel that such evidence had been given; but *Parke B.*, being referred to by this Court, stated that he had no recollection of such evidence, and that the only question, on the trial, was, whether the action lay for continuing the buttresses.

Lawrence

Lawrence v. Obee (a) Lord *Ellenborough* was of that opinion; and there is no authority to shew that a mere continuance is a trespass. Still less is such continuance a trespass, where the act complained of was originally done in pursuance of an act of parliament. The General Turnpike Act, 3 G. 4. c. 126. s. 147. (which extends to all local acts for making, &c., turnpike roads, sect. 4.), limits suits "for any thing done in pursuance of the act" to "three months after the fact committed," and provides that the defendant may give the special matter in evidence on the general issue. Here the buttresses were erected more than three months before the commencement of this action; and it would defeat the object of the act, if fresh actions could be brought for a mere continuance. In *Wordsworth v. Harley* (b) the defendant, as surveyor of highways, had added part of the plaintiff's land to the highway, and separated it from the rest by building a wall between the rest of the land and the road. After the lapse of three months the plaintiff sued defendant for building the wall, and thereby separating part of his close from the rest, and for "keeping and continuing" it so separated. It appeared that the wall was built, and the separation completed, more than three months before action brought; but the wall had been raised and finished within that period. It was held that the defendant was protected by the limitation clause in the General Highway Act. *Lord Oakley v. The Kensington Canal Company* (c) is also in point. *Smith v. Shaw* (d) also shews that interference

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(a) 1 Star. 22.

(b) 1 B. & Ad. 391.

(c) 5 B. & Ad. 138. And see *Jenkins v. Cooke*, note (a) to *Fraser v. The Kensington Canal Company*, 1 A. & E. 279.

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by giving improper directions for the doing of any thing supposed to be in execution of the provisions of the statute, is a "thing done in pursuance of the act." But, at all events, the former recovery is a complete bar; the damages given on the first action must be considered as the full estimated value of the land thus permanently occupied by the buttresses. The damages were in respect of prospective as well as past injury; the judgment operated as a purchase of the land. [Lord Denman C. J. If the property was changed, why did you not put in a plea to that effect?] It was needless to raise that question. The plea states a fact, which either shews a transfer of the property, or, at all events, precludes any further action for a trespass upon it. [Patteson J. How can you convert the recovery, and payment of damages for the trespass, into a purchase? A recovery of damages for a nuisance to land will not prevent another action for continuing it.] No act is shewn to have been done since the former recovery. The defendants have no right to enter the plaintiff's land, without her leave, in order to remove the nuisance; so that, unless the plaintiff removes it herself, the defendants will be exposed to continual actions, or be obliged to commit a further trespass by entering to remove it.

Starkie and *Crompton*, contra. The action lies, and is in the proper form. Every continuation of an original trespass is a fresh one. [Littledale J. If the defendant throws a heap of stones on the plaintiff's close, and there leaves them, will trespass lie from day to day, till they are removed?] "The continuing of a trespass

trespass from day to day, is considered in law a several trespass on each day;" note (1) to *Earl of Manchester v. Vale* (a). The Court of Exchequer have recently decided this point in *Hudson v. Nicholson* (b); where it was held that a count for keeping and continuing timbers, which had been placed on the plaintiff's close before he became possessed of it, was a count in trespass, and not case; and the case was there likened to that of a defendant who persists in holding out a pole into his neighbour's land, and who would be liable in trespass as long as he continued to do so. *Rosewell v. Prior* (c) is similar to the present case, except that it was an action on the case for a nuisance. There an action for continuing a nuisance to the plaintiff's lights was held to lie after a recovery for the erection of it. As to the supposed effect of the judgment in changing the property of the land, the consequence of that doctrine would be, that a person, who wants his neighbour's land, might always buy it against his will, paying only such purchase-money as a jury may assess for damages up to the time of the action. If the property was changed, when did it pass? Suppose the plaintiff had brought ejectment for the part occupied by the defendant's buttresses, would the recovery of damages in trespass be a defence? There is no case to shew that, when land is vested in a party, and fresh injuries are done upon it, fresh actions will

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(a) 1 Wms. Saund. 24., citing *Monckton v. Pashley*, 2 Ld. Raym. 976.

(b) Since reported in 5 M. & W. 437.; but the illustration, as there reported (p. 446.), differs from that mentioned in the present argument. See also the judgment of *Le Blanc and Bayley Js.* in *Wintebourne v. Morgan*, 11 East, 395.

(c) 2 Salk. 460. See also *Johnson v. Long*, 1 Salk. 10.; *Rex v. Peddy*, 1 A. & E. 822.

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against
WILSON.

not lie. Then, as to the powers of the local act and the limitation in the General Turnpike Act, the case is clearly not within either of them; for the local act expressly forbids any deviation to the north of a certain line, and the trustees wilfully directed the buttresses to be built on the ground beyond the line, in order to support their own defective works within it. But, even if the defendants are to have the benefit of the act, an action will lie for a continuing injury. *Roberts v. Read* (a) shews that the time runs from the date of the injury complained of, though trespass may lie for the act done. In *Wordsworth v. Harley* (b) the action was by a reversioner, whose cause of action was complete on the first erection of the wall, and not by an occupier for a continued trespass. [Patteson J. It is there remarked by Bayley J. that a continuation is not a new fact committed, within the statute. Indeed, if it were so, the act would be nugatory. You might bring an action at any time, whether there had, or had not, been a previous recovery.] The distinction is between an action for damage consequential upon an injury for which the plaintiff has already recovered a judgment, as in *Fetter v. Beale* (c), and an action for a continuing injury repeated de die in diem, in which the plaintiff can only recover damages up to the issuing of the writ.

Lord DENMAN C. J. The defendants are clearly not within the protection of either statute (d). Then, the

(a) 16 East, 215.

(b) 1 B. & Ad. 391.

(c) 1 Salk. 11.

(d) I did not appear that the Court assumed the original act to have been done bonâ fide with the intent of carrying the statute into effect: and the decision upon the limitation clause is therefore not noticed in the marginal abstract.

former

former and the present action are for different trespasses. The former was for erecting the buttresses. This action is for continuing the buttresses so erected. The continued use of the buttresses for the support of the road, under such circumstances, was a fresh trespass.

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LITLEDALE, PATTESON, and WILLIAMS Js. concurred.

Rule absolute to enter a verdict for the plaintiff (a).

(a) By a recovery in trespass for taking, or trover for converting, *personal chattels*, followed by satisfaction, the property is altered, and vests in the defendant; for "solutio pretii emptionis loco habetur." *Jenk. Cent.* p. 189. (*Cent.* 4. ca. 88.); *Keilw.* 58. b.; *Adams v. Broughton*, 2 *Sira.* 1078. But it is otherwise where the damages were not estimated on the footing of the full value; and this, it seems, may be shewn in a replication to the plea of the former recovery; *Lacon v. Barnard*, *Cro. Car.* 95. See also *Field v. Jellicus*, 3 *Lev.* 124., and the judgment of *Holroyd J.* in *Morris v. Robinson*, 3 *B. & C.* 206. *Quære*, whether the plaintiff, in the principal case, might not have recovered damages in respect of the expense of removing the buttresses herself; and the effect of such recovery?

1839.

Saturday,
June 8th.

GAREY *against* PYKE.

Plaintiff and defendant agreed that defendant should recommend customers to plaintiff, who was a tailor, and that plaintiff should allow defendant 10 per cent. upon the business so procured, to be received in clothes by defendant from time to time, as he might want them; and that a settlement of accounts should take place between the parties every six, or at farthest every twelve, months.

Plaintiff having sued in debt for goods sold and delivered, and having merely proved the delivery and acceptance of clothes,

Held, that he could not recover, but that, on *nunquam indebitatus*, he was bound to prove a settlement of

accounts on which the balance was in his favour.

Semble, that, had there been no stipulation as to the settlement of accounts, it would have been sufficient for plaintiff to prove the delivery and acceptance, and would have lain on defendant to prove a percentage due to him to the amount of what was so delivered.

DEBT for goods sold and delivered, work and labour, and on an account stated. Pleas. 1. *Nunquam indebitatus*. 2. A set-off for (among other matters not proved) the work and labour, care, &c., of defendant, as agent for plaintiff, and for commission and reward: the replication to which denied such debt from the plaintiff to the defendant.

On the trial before Lord *Denman* C. J., at the *London* sittings after *Michaelmas* term, 1837, the delivery and acceptance of the goods, consisting of clothes, was proved; but the defendant proved that, before the delivery, the following agreement was entered into between the plaintiff and defendant. "Memorandum of agreement made, this 31st day of *December* 1835, between *Hugh Pyke*, of" &c., "law agent, and *G. D. Garey* of" &c., "tailor, whereby the said *Hugh Pyke*, being in his capacity of law and general agent enabled to advance the interests of persons engaged in trade and commerce, hereby agrees, at the instance and request of the said *G. D. Garey*, to introduce a few of his friends and connections as customers to the said *G. D. Garey*, upon the express condition that he, the said *G. D. Garey*, agrees to allow the said *Hugh Pyke*, for his trouble and exertions, a fee of 10 per cent. upon the gross amount of all business and connections generally introduced by

OR

or from him the said *Hugh Pyke* to the said *G. D. Garey*; or any other connection, which may be introduced through the medium of the aforesaid connections and friends of the said *Hugh Pyke* to the said *G. D. Garey*, shall also be allowed (a) a like fee of 10 per cent.; and it is hereby understood that such allowance, remuneration, or fee, is to be received by the said *Hugh Pyke* in clothes, to be ordered by him the said *Hugh Pyke* from time to time as he may want the same; and that a settlement of accounts between the said parties shall take place every six months, or, at the farthest, in twelve months. In witness whereof" &c. (Signed by the plaintiff and defendant.)

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GAREY
against
PYKE.

The counsel for the defendant contended that it was incumbent on the plaintiff to shew that, under the special terms of this agreement, an account had been settled upon which the balance was in favour of the plaintiff. His Lordship directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a nonsuit. In *Hilary* term, 1838, Sir *John Campbell*, Attorney General, obtained a rule accordingly.

E. James now shewed cause. The agreement provides, not that all the clothes shall be paid for by the commission, but that the commission shall be paid for by clothes. So far, therefore, as the clothes exceed the commission, they are delivered without reference to the agreement, and debt lies. In *Sheldon v. Cox* (b) the plaintiff gave a horse to defendant for a horse belonging to defendant, and five guineas; and, the defendant's horse having been delivered to the plaintiff,

(a) *Sic.*

(b) 3 B. & C. 420.

1839.

 GAREY
 against
 PYKE.

but the five guineas not paid, it was held that the five guineas might be recovered in *indebitatus assumpsit* for horses sold and delivered. The plaintiff here shews a *prima facie* right by proof of the delivery and acceptance of the clothes: it was for the defendant to meet that, by evidence that a larger sum than the value of the clothes was due for commission. If the defendant had sued for the commission, the plaintiff would have been bound to shew that he had delivered clothes to the amount.

Sir *J. Campbell*, Attorney General, and *Busby*, *contra*. The agreement provides for a periodical settlement of account, for the purpose of determining which party is indebted to the other. No action lies for what is done under this agreement till such an account is settled. This is not like a common contract between the tradesmen to work for each other, without any provision for settling the accounts: though, even in such a case, it may be contended that it would not be sufficient to declare simply for work and labour, and leave the defendant to meet the case by shewing a counter claim under the agreement. *Edmunds v. Harris* (a), which seems to be an authority the other way, is overruled (b).

LORD DENMAN C. J. We must take it as if the special agreement had been the first thing put in evidence. Then the plaintiff would have had to shew that the value of the clothes delivered had exceeded the value of the commissions upon the settlement of accounts.

(a) 2 A. & E. 414.

(b) See *Hayselden v. Staff*, 5 A. & E. 153.

LITLEDALE J. Except for the stipulation as to the settlement of accounts, I think the plaintiff might have recovered. But that made it incumbent upon the plaintiff to shew, as a preliminary step, that a settlement had taken place, upon which the balance was in his favour.

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against
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PATTESON J. Upon the issue on the plea of *nunquam indebitatus*, the plaintiff had to shew that, at some given time, the defendant was in his debt. If there had been no agreement, he might have done this by proving the delivery and acceptance of the clothes. Here the case is as if the plaintiff had begun by putting in the agreement; and then, as that shews that the defendant was to receive his per centage in clothes, it would have been for the defendant to show a per centage due to him to the amount of the value of the clothes, except for the stipulation as to the periodical settlement of accounts. But that stipulation shews that the parties did not mean that either should be entitled to sue the other whenever there was any balance one way or the other, however trifling; but that the balance was to be taken periodically, and that then the party in whose favour it should be might claim it. Therefore, till such a settlement took place, there was no debt; and it lay on the plaintiff to prove the fact of the settlement and the balance.

WILLIAMS J. This case is in a very narrow compass. The question is, whether the defendant was indebted *modo et formâ*, that is, in a sum to be paid on request. When the agreement was put in, it was clear that this was not an ordinary contract; and the plaintiff was to shew that there was a debt within the terms of the agreement.

Rule absolute.

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Saturday,
June 8th.HENRY MERRY and THEOPHILUS MERRY *against*
CHAPMAN, Esquire.

In debt against the marshal of Q. B. for an escape of *W.*, a prisoner in custody under a ca. sa. at the suit of plaintiff, defendant pleaded that *W.* had the privilege of the rules; that *L.* sued out a capias on mesne process against *W.*; that *L.* and plaintiff, well knowing that *W.* was so privileged, and

not legally liable to be arrested out of the rules, "fraudulently, illegally, and covinously, combined and conspired" with others to procure *W.* to be arrested on *L.*'s writ: and, in pursuance of such fraudulent &c., caused a sheriff's officer to watch *W.* to ascertain whether he went beyond the rules, and to arrest him and keep him without the rules, if he did; that *W.*, without defendant's consent, went without the rules; and, while he was so, and intended to and was about to return within the rules, plaintiff and *L.*, with others in collusion with them, in further pursuance &c., wrongfully and covinously caused *W.* to be arrested and conveyed to a place without the rules, and there detained during such time as was required to enable plaintiff to sue defendant for the escape; that, had not *W.* been so collusively and illegally detained, he could have returned within the rules before the commencement of the suit; that, after the commencement, *W.* returned within the rules, and had been in defendant's custody ever since; and that defendant had no notice of the escape before the commencement of the suit. Replication *de injuriâ*, as to all but the allegation that *L.* sued out and prosecuted his writ, &c., while *W.* was entitled to the rules.

1. It was proved that *U.* employed a person to watch for *W.* and procure his arrest and detention without the rules, at the suit of *L.*, while *W.* appeared to be intending to return within the rules; and that, during the detention, *U.* went with the attorney's clerk to take out the writ in the action for the escape. The jury having been satisfied that plaintiff was a party to *U.*'s proceedings, and the Judge having directed a verdict for the plaintiff, this Court, on motion, ordered a verdict to be entered for the defendant, on the ground that the jury might infer plaintiff's privity from his adopting *U.*'s acts by bringing the action; and that such privity proved the substance of the issue.

2. But the Court granted judgment for the plaintiff non obstante veredicto, the plea not shewing that *W.* would have returned within the rules had he not been detained without.

3. The rule for entering the verdict for the defendant having been obtained in the first, and made absolute in the sixth, term after the trial, the Court, upon making it absolute, granted the rule nisi for judgment non obstante veredicto, considering the case an exception from the rule of *Hil. 2 W. 4. I. 65.*

execution

execution, for the sum indorsed on the ca. sa.; that defendant, being marshal, received and had *Wright* in his custody, in the prison of the *Marshalsea*, in execution for the said sum, at the suit of plaintiffs: that afterwards, towit on 27th *August* 1837, defendant wrongfully, unlawfully, and unjustly, without the leave or licence of plaintiffs, and against their will, suffered and permitted *Wright* to escape and go at large from and out of the said prison, and out of the said custody of the said defendant, wheresoever *Wright* would, without restraint, &c., the plaintiffs being then and still wholly unsatisfied their damages, &c.

Fourth plea. That, after the commitment of *Wright*, and before and at the time of his escape, he had applied for and had obtained and was entitled to the privilege of residing without the walls of the prison, and of living and abiding within the rules: that, while he was so entitled, one *Thomas Buckby Lefevre*, heretofore, towit 26th *October* 1837, sued out a *capias* (on mesne process) in this Court, directed to the sheriff of *Surrey*, indorsed for bail, which was delivered to the said sheriff, who made his warrant to *George Rutland*, his bailiff, marked for bail, which was delivered to *Rutland* to be executed: that, before and after the suing out of the writ and granting of the warrant as aforesaid, *T. B. Lefevre* and the plaintiffs, well knowing that *Wright* had the privilege and benefit of the rules, and was not legally liable to, and ought not to be, arrested or taken out of or beyond the limits or boundaries thereof, fraudulently, illegally, and covinously, combined and conspired together with divers others persons to cause and procure *Wright* to be taken and arrested on the said writ and warrant: and, in further pursuance of such fraudulent and covinous combination

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combination and conspiracy, caused and procured *Rutland* to watch and follow *Wright* to ascertain whether he at any time went beyond or exceeded the limits or boundaries of the said rules, and to arrest him by his body if he should go beyond &c., and keep and detain him beyond the said limits and boundaries: that afterwards, towit on the said 26th *August*, and while *Wright* was entitled to, and had obtained the benefit of, the rules as aforesaid, *Wright*, without the knowledge or consent and against the will of defendant, did go a little beyond the limits and boundaries of the rules, towit 100 yards beyond such limits and boundaries: and, while *Wright* intended, and was about, to return to and within the said limits and boundaries, plaintiffs and *T. B. Lefevre*, with others in collusion with them, in further pursuance of the said fraudulent contrivance and combination, wrongfully and covinously caused and procured *Wright* to be arrested by his body, and carried and conveyed to a place of confinement, at a great distance from the said limits and boundaries of the rules, towit three miles beyond the said limits or boundaries, and caused and procured him to be kept and detained in such place of confinement, and out of and beyond the said limits and boundaries, for and during such time as was required to enable plaintiffs to sue and prosecute out of the said Court of our said Lady the Queen a certain writ of summons against the defendant for the said alleged escape, and serve the defendant with a copy thereof, for and as the commencement of this suit, towit for the space of six hours then next following: that, had not *Wright* been so collusively and illegally arrested and detained, he could have returned and been within the limits and boundaries of the rules before the commencement

commencement of this suit: that, after the commencement of this suit, and after defendant was served with a copy of the writ of summons, *Wright* was brought back again into the custody of defendant as such marshal, and that the defendant did thereupon then keep and detain, and always from thence hitherto hath kept and detained, and still doth keep and detain, *Wright* in the custody of this defendant, as such marshal as aforesaid: and that defendant had no notice or knowledge of the said escape at any time before the commencement of this suit; which said escape in this plea mentioned is the same &c.: verification.

Replication. That, although true it is that *T. B. Lefevre* did, while *Wright* had obtained and was so entitled to the benefit of the rules, sue and prosecute out of the Court of our Lady the Queen the said writ in the said plea mentioned, and that the sheriff did make his warrant in writing directed to *Rutland*, as in that plea also mentioned, for replication, nevertheless, &c. (*de injuriâ absque residuo causæ*).

Issue thereon.

There were also other issues in fact.

On the trial before Lord *Denman* C. J., at the *Middlesex* sittings after *Hilary* Term 1838, it appeared that *Wright* was an attorney; that a person named *Underhill* employed a man named *Pope* to watch for *Wright* for several days up to 26th *August*, on which day *Wright* went to his own house, without the rules, and was there arrested at the suit of *Lefevre*. *Underhill* was not present at the arrest; but *Pope* was present, with the sheriff's officer. *Wright* had engaged to dine within the rules about two o'clock. Upon being arrested, *Wright* desired to be taken back within the rules; but the

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the sheriff's officer, by taking him back by a circuitous route, caused a delay, during which, and before *Wright* returned within the rules, the writ in the present action was sued out and served upon the defendant. *Underhill* went with the attorney's clerk to take out this last writ, and, at the same time, took out a writ in an action against the defendant for *Wright's* escape in a suit in which *Underhill* himself was plaintiff. *Wright* was afterwards brought back within the rules. Other evidence—including a correspondence between *Wright* and one of the plaintiffs, was put in, shewing, as the defendant contended, that *Underhill* was the party really interested in the judgment obtained by the plaintiffs against *Wright*. The counsel for the plaintiffs contended that this evidence did not connect the plaintiffs with the arrest at the suit of *Lefevre*, within the allegations of the fourth plea. The other issues having been proved for the plaintiff, the Lord Chief Justice, as to the issue on the fourth plea, desired the jury to say whether they considered *Underhill* to have been employed by the plaintiffs to effect the arrest under the particular circumstances. The jury having found for the defendant on this issue, his Lordship expressed his opinion that the plea was not proved, and also that it was bad; and he directed a verdict to be entered for the plaintiff on all the issues, reserving leave to move to enter a verdict for the defendant on the issue on the fourth plea. In *Easter* term, 1838, Sir *John Campbell*, Attorney General, obtained a rule accordingly.

Kelly, *Crowder*, and *Ogle* now shewed cause (a). The plea alleges that the plaintiffs fraudulently, illegally,

(a) Before Lord Denman C. J., *Littledale*, *Patterson*, and *Williams* Jr.
and

and covinously, combined and conspired to procure *Wright* to be arrested on the writ issued at the suit of *Lefevre*. Now no evidence was given of the intervention of the plaintiffs. There may have been evidence for the jury that *Underhill* was a party to the proceeding: but he is not identified with the plaintiffs. Even admitting that *Underhill* was a party interested in the judgment obtained by the plaintiffs, upon which the ca. sa. issued under which *Wright* was in custody, that would shew only that an agent of the plaintiffs had conspired; and conspiracy by an agent is not a conspiracy by the principal, unless the principal be privy to the conspiracy. But, in fact, the evidence does not shew that *Underhill* was interested in the judgment. In *Hiscocks v. Jones (a)* it was held that the marshal might defend himself by shewing that the escape was by the fraud of a party for whose benefit the judgment had been assigned to another. Had such a defence been raised upon this record, the plaintiff would have traversed the allegation that *Underhill* was the party beneficially interested in the judgment, and must have succeeded on the evidence. In *Hiscocks v. Jones (a)* the party enticed the prisoner out of the rules; here it merely appears that *Underhill* learned that the prisoner was out of the rules, and then executed his writ. He had a right to do so, even if he watched for the opportunity. The marshal was liable for the escape the moment *Wright* was out of the rules. The law indeed allows the marshal, by way of excuse (not by way of negating the escape), to shew that he had the prisoner in custody at the time of the commencement of the action for the escape. But here it is

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not denied that *Wright*, without any fraud on the part of the plaintiffs or their agents, was without the rules; and the charge, if fully proved, would merely shew a concerted plan to prevent the marshal from relieving himself from an action to which he was actually liable. That, at the utmost, would be ground only for a cross action. But there is no evidence that *Lefevre* was not a bonâ fide creditor. The plea alleges that the plaintiffs knew that *Wright* had the privilege and benefit of the rules: but in fact he was out of the rules, and could be in the enjoyment of no privilege whatever.

Sir *John Campbell*, Attorney General, and *Petersdorff*, contra. The conspiracy charged is not a criminal conspiracy, strictly speaking: the allegation substantially asserts no more than the privity of the plaintiffs to the trick. Upon this issue it is not incumbent to prove a technical conspiracy, any more than a plaintiff in assumpsit is bound to support the common words of the breach by proving a contrivance and fraudulent intention. On the evidence it is clear that *Underhill* was a party to a contrivance to deprive the marshal of the defence which the law allows him. If that was the purpose of the arrest, whether or not at the suit of a bonâ fide creditor, no person privy to the arrest has a right to complain of the escape. The privity of the plaintiffs to *Underhill's* acts is shewn by *Underhill* being a party really interested in the judgment at the suit of the plaintiffs. Even if that were not so, there was clear evidence that the plaintiffs adopted *Underhill's* act. His act is therefore their's; and the issue is substantially proved by the defendant. It would have been enough if the plea had alleged only that the plaintiffs procured *Wright* to be
 arrested

arrested without the rules for the purpose of defeating the marshal's defence: the allegation of a conspiracy is surplusage. Thus, the personal presence and concurrence of one of the plaintiffs in the arrest would have been conclusive evidence in support of the plea, though it would not have supported a technical charge of conspiracy by the two plaintiffs. [*Patteson J.* An allegation that a sheriff has obtained a bond fraudulently may be supported by proof that his agent has done so, though the sheriff is not personally privy to the fraud (a).]

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Cur. adv. vult.

Lord DENMAN C. J., in the vacation after this term (13th *June*), delivered the judgment of the Court.

The facts in this case are so plain, and shew the nature of the transaction so clearly, that no one who attends to them can doubt that the whole was a trick and contrivance on the part of Mr. *Underhill* to fix the marshal with an escape.

The question is, whether the acts of *Underhill* were the acts of the plaintiffs. On the 26th of *August Wright* was in custody (*i. e.* having the benefit of the rules), at the suit of the plaintiffs in execution, and at the suit of *Underhill* and others on mesne process. He is arrested on mesne process at the suit of *Lefevre*, by the orders of *Underhill*, whilst out of the rules; and he is kept out of the rules against his will until *Underhill* himself, with an attorney's clerk, fetches the writ in this action, and also a writ at the suit of *Underhill* and others for the escape: and the marshal is served with

(a) See *Raphael v. Goodman*, 8 A. & E. 565.

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them: after which *Wright* is brought back within the rules.

The plaintiffs in this action adopt the act of *Underhill* in so procuring the writ; for they go on to declare and prosecute the suit: and it surely was a question for the jury, whether they did not, by such adoption, make themselves parties to the whole of *Underhill's* trick and contrivance.

Two letters were in evidence, one of the 10th *March* 1837, from *Wright* to one of the plaintiffs; the other, the answer on the 24th *March*. The defendant wished to infer from them that *Underhill* was the party really interested in the judgment obtained by the plaintiffs: but, on attending to the language of them, though they shew an intimate connection between *Lefevre* and the plaintiffs, their direct reference is, not to that judgment, but to a threatened arrest on the bill held by *Lefevre*, and on which the arrest in *August* afterwards took place.

But the circumstances under which, and the persons by whom, the writ in this action was sued out form adequate ground for charging the plaintiffs with collusion and trick; and surely the jury might well hold that they were parties to it.

Rule absolute.

In this term, *Kelly* obtained a rule for entering judgment for the plaintiff, non obstante veredicto (a). In the *Michaelmas* vacation following (28th *November* 1839),

Sir

(a) The rule nisi was entered as of *June* 12th, 1839, the last day of term, having been granted by the Court at the time (*June* 13th) of making the former rule absolute, and having been so entered to avoid dating a rule nisi in vacation. In shewing cause, the Attorney General sug—
gested—

Sir *John Campbell*, Attorney General, and *Petersdorff*, shewed cause. The plea shews that the plaintiffs, by their own fraud, prevented *Wright* from returning in time to save the escape: they, therefore, have no right to complain of the escape. All escapes are negligent, except those which are voluntary, or which happen by the act of God or of an enemy. Thus, an escape which results from the prison being demolished by rioters is negligent (a). On a negligent escape, if the sheriff retake before action brought, it is an answer; *Rigeway's Case* (b): which, by stat. 8 & 9 W. 3. c. 27. s. 6., must be specially pleaded. A voluntary return by the prisoner may be also pleaded, being equivalent to a recaption; *Bonafous v. Walker* (c), *Chambers v. Jones* (d). Here, therefore, the plaintiffs have prevented that which would have negatived the complaint; and it is as if they had actually contrived the escape in the first instance, in which case they could not have recovered; *Hiscocks v. Jones* (e). So leave and licence would be a good plea. Besides, it appeared that *Wright* was an attorney; the arrest was therefore illegal, since he was privileged (g).

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Kelly (with whom was *Ogle*) contra. At the time of the alleged arrest under the writ at the suit of *Lefevre*,

gested that the second rule was obtained too late, under *R. Hil. 2 W. 4. l. 65.* (3 B. & Ad. 383.), unless there was an implied exception; but Lord Denman C. J. said that the case was not within the rule. See *Lumby v. Allday*, 1 Tyrwh. 217., and note at p. 225. there.

(a) See *Elliott v. The Duke of Norfolk*, 4 T. R. 789.

(b) 3 Rep. 52 a. See note (B) in *Thomas and Fraser's* edition.

(c) 2 T. R. 126.

(d) 11 East, 406.

(e) *Moo. & M.* 269.

(g) But see *Byles v. Wilton*, 4 B. & Ald. 88. And see stat. 12 G. 2. c. 13. s. 9.

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there was a complete cause of action; note (1) to *Jones v. Pope* (a). Then it is said that the plea shews that, but for the act of the plaintiffs, fresh facts would have taken place which would have constituted an excuse. That, however, would shew only that the plaintiffs were liable to a cross action, or possibly to an indictment. But the plea does not shew that *Wright* would have returned before the action was brought. It alleges only that, at the time of the arrest, *Wright* intended to and was about to return within the rules, and that, had he not been so arrested, he *could* (not *would*) have returned before the commencement of the suit. The intended return might, had there been no arrest, have taken place, consistently with this plea, a month after the commencement of the action. In *Regina v. Brownlow* (b) it was held that the word "instantly," in a coroner's inquest, was not equivalent to "then." The allegation that the plaintiffs kept and detained *Wright* without the rules, during such time as was required to enable the plaintiffs to sue out their writ, is equally indefinite. [*Patteson* J. The conspiracy, as alleged, was to procure the arrest, not to detain for any time. *Coleridge* J. Consistently with the plea, *Wright* might have been arrested and released before the time at which he would have returned had there been no arrest.]

Per Curiam (c) (stopping *Ogle*),

Rule absolute

(a) 1 *Wms. Saund.* 35 a.

(b) 11 *A. & E.* 119.

(c) Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

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The Duke of BEAUFORT *against* WELCH.Monday,
June 10th.

BY an order of nisi prius at the *Gloucester* assizes, *July* 1838, a verdict was taken in the above cause for 2000*l.*, subject to the award of *C. W.*, to whom it was referred, "to settle the cause and all matters in difference" between the parties; the arbitrator to have the same power as a judge to certify as to costs, and to order and determine what he should think fit to be done by the parties respecting the matters in dispute; the costs of the cause to abide the event of the award, and the costs of the reference to be in the discretion of the arbitrator.

The declaration in the action contained a special count in assumpsit on a retainer of defendant by plaintiff to project and design certain apparatus for warming plaintiff's house with warm water, to superintend the fixing of it, to examine the bills of the persons employed to fix it, and to certify their reasonableness; and it alleged a promise to use due care, skill, and diligence in and about the premises. Breach, that defendant did not use due care, skill, or diligence, &c., with an allegation of special damage. Counts for money had and received, and account stated. Pleas: 1. Non assumpsit. 2. Denial of the retainer alleged in the first count. 3. As to part of the first count, that defendant did use due care, skill, and diligence in and about projecting and designing, and superintending the fixing of the apparatus. 4. As to other part of the

Assumpsit on a retainer to project certain works, and to examine certain bills, with care, skill, and diligence. Pleas, 1. Non assumpsit; 2. No retainer; 3. That defendant did use care, &c., in projecting the works; 4. That he did use care, &c., in examining the bills. The cause and all matters in difference were referred by order of Nisi Prius; costs of the cause to abide the event. The award found for defendant on 1st, 2d, and 4th issues, and for plaintiff on 3d. Held, that the award was good, and not repugnant; for that the finding on the 3d and 4th issues must be regarded as hypothetical, and only for the purpose of determining the costs of them; and that it could not be inferred, from such finding, that there was

matter in difference in respect of work done, other than the work included in the action.

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 ———
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first count, that he did use due care, &c., in examining the bills of the persons employed. 5. As to the money counts, a set off.

The arbitrator directed, by his award, that a verdict should be entered for defendant; that the first, second, and fourth issues should be also found and entered for him; and that the third and fifth issues should be found and entered for plaintiff.

In last *Easter* term *Lullow* Serjt., on the part of the plaintiff, moved to set aside the award, and obtained a rule nisi on the ground, among others, that the award was inconsistent and contradictory in finding the first, second, and fourth issues for defendant, and third and fifth for plaintiff; and that there were matters in difference which were left unsettled (a).

Talfourd Serjt. and *R. V. Richards* now shewed cause. As the costs are to abide the event, it was necessary for the arbitrator to find upon every issue, in order that the costs of each might be distinguished. The effect of the finding is, that there was no such contract by, or retainer of, the defendant as stated in the declaration; but that, supposing there was one, the defendant had failed in the performance of that part of it which obliged him to project and design the apparatus, &c., with care, skill, and diligence, though he had properly examined the bills. Perhaps the defendant may have been retained to carry into effect the project and design of some other person, and therefore could not be said to have used care and skill in projecting and designing the

(a) There were affidavits to shew that there were other matters in difference before the arbitrator, besides those included in the action; but they were not considered satisfactory by the Court.

apparatus

apparatus himself. As to other matters in difference, none are shewn.

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Ludlow Serjt., contra. The award is repugnant on the face of it, and therefore bad. If the defendant entered into no contract at all, he cannot have performed any part of it, as is found on the fourth issue. If he improperly performed part of it, as found on the third issue, then there must have been a contract to perform. A traverse, and a confession and avoidance, cannot both be true. If it be said that the works found to be improperly done on the third issue are not the works contracted for, then there must have been some other works not included in the action, and on which no award has been made. If there be any doubt whether the award comprehends every matter submitted, then it is bad, because it leaves a question open to litigation, as appears from the language of *Patteson J.* in *In the matter of Tribe and Upperton (a)*.

LORD DENMAN C. J. There is no inconsistency. The award shews that there was no contract; but that, if there was one, then one of the alleged breaches of it was proved. So the defendant may have performed the alleged work, yet not have contracted to perform it at all. We cannot infer from the award that there was any other matter in issue.

LITLEDALE J. It is found that the defendant did use due care and skill in and about a business which he had not contracted to execute. This is possible; for

(a) 3 A. & E. 302.

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PATTESON J. It is sought to set aside the award by inference; but it does not appear under what circumstances the work was done; nor does the plaintiff distinctly shew, by affidavit or otherwise, that work was done independently of that in respect of which the action was brought. The declaration charges a retainer, which is negatived by the award. The finding on the remaining issues is material only for the purpose of settling the costs of them. The arbitrator is therefore obliged to find upon them hypothetically. He says that, taking the contract as stated, the defendant, as to part, performed it, and, as to another part, did not perform it.

WILLIAMS J. The imputation of negligence in the performance of certain work, as established by the finding on the third plea, does not necessarily imply that the defendant had engaged, or was retained, to perform it with care, skill, and diligence, or that he was employed to do work, other than that included in the action. The finding on all the pleas after the first and second is hypothetical, and only necessary for the purpose of distributing the costs.

Lord DENMAN C. J. In such cases, it is a rule to discharge with costs.

Rule discharged with costs.

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he QUEEN against The EASTERN COUNTIES *Monday,*
Railway Company. *June 10th.*

SIR J. CAMPBELL, Attorney General, in last By a railway
act (6 & 7
W. 4. c. cvi.,
local and per-
sonal, public)
it was recited
that the mak-
ing a railway
from London
to Norwich and
Yarmouth,
passing by Col-
chester, &c.,
would be of
great public
advantage; and
that persons

used were willing at their own costs to carry the undertaking into execution. The
persons named, with other shareholders, were incorporated into a company to carry the
act into execution. They were authorised to raise by shares 1,600,000*l.* (which, it
was recited, was the probable expense), and, in case that sum should not be sufficient,
to borrow on mortgage, or raise by additional shares, 500,000*l.* The line was set
out in the act, describing the places from London through Middlesex, Essex, Suffolk, and
Norfolk, with two termini, one at Norwich, the other at Yarmouth. The usual powers to
take lands were conferred, with power to deviate from the line to a limited extent. All
the 1,600,000*l.* was to be subscribed for, before the company could exercise their com-
pulsory powers; and these powers were to cease, unless executed within two years: and, if
the whole work was not completed in seven years (unless prevented by inevitable accident),
then their powers were to cease, except as to the part (if any) completed. If any part was
abandoned, the lands were, as to that part, to vest in the owners of the lands adjoining.
By a second act (1 & 2 Vict. c. lxxxi., local and personal, public) two years more were
added to the first two years; and the company were forbidden to deviate, unless the line
of deviation were set out within one year from the passing of the last act.

On application for a mandamus to the company to proceed with the whole line, setting
out deviations, &c., and to purchase the necessary lands, it appearing to the Court that the
affidavits shewed reasonable ground for believing that the company intended to complete the
line from London to Colchester only, and to abandon the rest, the writ was granted, though
the company stated that they had not, nor could raise without a new act, funds sufficient
to complete the line.

The mandamus suggested that the company had been required to define the deviations,
and complete the railway to Norwich and Yarmouth, but that they had refused and ne-
glected to purchase the necessary lands between Colchester and Norwich, and Norwich and
Yarmouth, or set out the deviations, or to make and complete the railway. There was no
verment that the company had abandoned the design, or were not proceeding with all
convenient speed, or that a reasonable time had elapsed without proper preparations, or
that deviations would be expedient.

Held, that the mandamus was insufficient.

When cause is shewn against a rule for a mandamus, the objection, that no sufficient
demand and refusal appear, must be taken before the merits are discussed.

(a) Stat. 6 & 7 W. 4. c. cvi., local and personal, public, is "For making
railway from London to Norwich and Yarmouth, by Romford, Chelmsford,
Colchester, and Ipswich, to be called 'The Eastern Counties Railway.'"
Royal Assent, 4th July, 1836.).

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and especially to set out and define the line of the said railway, particularly that part thereof, lying between *Colchester*

Sect. 1 recites that "the making a railway from *London* to *Norwich* and *Yarmouth*, passing by *Romford*, *Cholmsford*, *Colchester*, and *Ipswich*, would be of great public advantage by opening an additional, certain, and expeditious communication between those cities and towns and the intermediate and adjacent towns and districts, and also by facilitating the means of intercourse between the metropolis and the eastern districts of *England*;" and that "the several persons hereinafter named are willing at their own costs and charges to carry the said undertaking into execution, but the same cannot be effected without the authority of parliament:" and incorporates certain persons named, and all present or future subscribers, their successors, executors, administrators, and assigns, by the name of "The Eastern Counties Railway Company," giving them power to purchase, hold and sell lands for the use of the undertaking; and enacts that "they shall also have and exercise all other powers and authorities which are hereinafter given or mentioned."

Sect. 3 enacts "that it shall be lawful for the said company to raise amongst themselves any sum of money for making and maintaining the said railway and other works by this act authorized, not exceeding in the whole 1,600,000*l.*," to be divided into shares of 25*l.* each. Sect. 4 gives the company power to sue subscribers for their subscriptions. Sect. 5 enacts "that the money to be raised by the said company by virtue of this act shall be laid out and applied, in the first place, in paying and discharging all costs and expenses incurred in applying for, obtaining, and passing this act, and all other expenses preparatory or relating thereto, and afterwards the remainder of such money shall be applied in, for, and towards purchasing lands, and making and maintaining the said railway and other works, and in otherwise carrying this act into execution."

Sect. 6 enacts "that it shall be lawful for the said company and they are hereby empowered to make and maintain the railway hereinafter mentioned, with all proper works and conveniences connected therewith, in the line or course, and upon, across, under, or over the lands delineated upon the amended plan, and described in the amended book of reference to be deposited with the respective clerks of the peace for the counties of *Middlesex*, *Essex*, *Suffolk*, and *Norfolk*, and the town and county of the city of *Norwich*; (that is to say,) a railway commencing at or near *High Street*, *Shoreditch*, in the parish of *St. Leonard's Shoreditch* in the county of *Middlesex*, and to terminate in, at, or near *Norwich* and *Great Yarmouth*, (that is to say, as regards *Norwich*, in, at, or near *Carrow Abbey Field* in or near the city and county of *Norwich*, and as regards *Great Yarmouth*, at or near the new suspension bridge in *Great Yarmouth* aforesaid,)

testers and Norwich, and Norwich and Yarmouth, deviating from the line laid down on the plans in the said last-

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(oremsid,) and passing from, through, or into the parishes, townships, and places of Christ Church Spitalfields," &c., "or some of them, all in the county of Middlesex; Low Layton," &c., certain places named in the borough of Colchester, &c., "or some of them, all in the county of Essex; East Burgholt," &c., "Witheringsett," &c., "or some of them, all in the county of Suffolk; Scole," &c., "or some of them, all in the county of Norfolk; Norwich, Thorpe," &c., "or some of them, all in the city and county of Norwich; Wittingham," &c., "and certain extra-parochial lands, or some of them, all in the county of Norfolk." Sect. 7, reciting that, since the depositing of the maps, &c., and books of reference, certain alterations of the line had been agreed upon with the concurrence of owners and occupiers, enacts that maps or plans, describing the line as agreed to be altered, together with amended books of reference thereto, shall be deposited with the said clerks of the peace respectively. Sect. 9 and several following sections give the ordinary powers to take lands, &c., by purchase, or, in default of agreement, on paying sums to be assessed by a jury. By sect. 53 the company could take no building erected before 30th November 1835, nor any ground then used as a garden, orchard, yard, &c., without the owner's consent, unless specified in the schedule annexed to the act, or omitted by mistake, to be certified as there provided.

Sect. 54 defines the breadth of the railway. Sect. 55 enacts "that the said company in making the said railway and other works by this act authorised shall have full power and authority to deviate from the line delineated on the maps or plans so deposited with the clerks of the peace," with certain limitations as to extent; and no deviation is to be made into the lands of persons not mentioned in the book of reference, or omitted by mistake: such omission to be certified as provided in the act.

Sect. 130, and several sections following, provide for periodical general and special general meetings of the company, and for the method of voting by the shareholders at such meetings. Sect. 138 names the first directors of the company, who are thereby appointed "to manage the affairs of the said company:" five to be a quorum; and subsequent sections provide for the election of successors to them by the shareholders. Sect. 144 enacts "that the directors for the time being of the said company shall superintend all the affairs thereof, and have power to use the common seal of the said company on their behalf, and shall have full power and authority to do all acts whatsoever for carrying into effect the purposes of this act, and for the management, regulation, and direction of the affairs of the said company, or relative thereto, which such company are by this act authorised to do (except such as are herein required and directed to be done at some general

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last-mentioned act in that behalf referred to; and to proceed to purchase the lands necessary to the making and

neral or special general meeting of the said company).” Sect. 158 gives power to make, at the general and special general meetings, “such by-laws, orders, and rules as to them shall seem expedient for regulating the proceedings, and remunerating and reimbursing the expenses of the directors, and for the good government of the officers and servants of the said company, and for the management of the said undertaking in all respects whatsoever.”

Sect. 159 gives the directors power to make calls, not exceeding 3*l*. per share, at intervals of not less than three months, and on notice of at least twenty one days; and provisions are made for enforcing the calls. Sect. 174 authorises the public to use the railway on payment of certain tolls, and in conformity with regulations, to be determined as there and in subsequent sections specified. Sect. 177, and sections following, give the company power to carry goods and passengers at such charges for carriage as they shall determine upon, in addition to the tolls, &c., before authorized.

Sect. 220. “And whereas the probable expense of making the said railway and other works hereby authorised will amount to the sum of 1,600,000*l*., and the sum of 1,300,000*l*. and upwards, or upwards of four-fifths thereof, has been already subscribed for by several persons under a contract binding themselves, their heirs, executors, administrators, and assigns, for the payment of the several sums by them respectively subscribed for; be it therefore enacted, that the whole of the said sum of 1,600,000*l*. shall be subscribed for in like manner before any of the powers given by this act in relation to the compulsory taking of land for the purposes of the said railway shall be put in force.” Sect. 221 enacts that a certificate of a justice shall be evidence that the 1,600,000*l*. has been subscribed.

Sect. 222 enacts “that unless the said company shall within the space of two years, to be computed from the passing of this act, agree for or cause to be valued and paid for as herein mentioned the lands which they are by this act empowered to take or use, or so much thereof as shall be by them deemed necessary and proper for the purposes of making the said railway and other works hereby authorized” (with an exception specified), “then and from thenceforth the powers which are hereby granted to them for compulsorily requiring, taking, or using such lands shall cease and be utterly void (save and except with the consent in writing of the owners and occupiers thereof respectively).” Sect. 223 enacts “that in case the said railway and works shall not have been made and completed (unless prevented by inevitable accident) within the space of seven years

and completing the said railway, and lying between *Colchester* and *Norwich*, and *Norwich* and *Yarmouth* aforesaid,

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years, to be computed from the passing of this act, then from and after the expiration of the said term of seven years all the powers, authorities, and privileges given by this act shall thenceforth cease and determine, save only and except as to so much (if any) of the said railway and works as shall be declared and certified to have been completed within the said term by the justices of the peace of the said counties of *Middlesex*, *Essex*, *Suffolk*, and *Norfolk*, and the said town and county of the city of *Norwich*, or any one of them, assembled at any general or quarter sessions of the peace to be holden in and for the said counties or any of them at any time before the expiration of the said term of seven years, or within six calendar months next after the expiration thereof."

Sect. 246 enacts "that in case the money by this act authorized to be raised by subscription, as hereinbefore mentioned, shall be found insufficient for the making, completing, and maintaining of the said railway and other works by this act authorized to be made, and for defraying all necessary charges and expences relating thereto or for the purposes of this act, and the said company shall be desirous of raising a further and additional sum of money, it shall be lawful for the said company, by an order of any general or special general meeting thereof, to borrow and take up at interest any such further or additional sum, not exceeding in the whole the sum of 533,333*l.*, on the credit of the said undertaking, as to them shall seem meet and convenient; and the said company or the directors hereof, after an order shall have been made for that purpose at any general or special general meeting of the said company, are hereby authorized and empowered to mortgage and assign the property of the said undertaking, and the rates, tolls, and other sums arising or to arise by virtue of this act, or any part thereof," (paying the costs of the assignment out of the tolls, &c.), "as a security for any further sum of money to be borrowed as aforesaid, with interest, to such person as shall advance the same." The same section, and following ones, lay down provisions for enabling the mortgagees to avail themselves of the securities. Sect. 252 empowers the company to raise any part of the additional sum by new shares, in augmentation of their capital, instead of mortgage.

Sect. 254 enacts "that if the railway or any part thereof shall at any time hereafter be abandoned or given up by the said company, or after the same shall have been completed shall for the space of three years cease to be used and employed as a railway or otherwise as authorized by this act, then and in such case the lands so authorized to be and so purchased or taken by the said company for the purposes of this act, or otherwise the parts thereof over which the said railway or any part of such railway
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said, pursuant to the provisions of the said several acts.

The rule was obtained on the affidavit of *Charles Symonds* and others. *Symonds* stated that he was owner of a farm and lands in *Suffolk*; that the lines laid down in the amended plan mentioned in sect. 7 of stat. 6 & 7 W. 4. c. cvi. intersected his farm and lands; that his name was mentioned in the amended book of reference referred to in the same section, as owner or reputed owner thereof; and that his farm and lands were specified in the schedule referred to in sect. 53, as belonging to him, and were therein described as "farm, cottage, yard, and barn, orchards and garden." That, at the expiration of two years from the passing of the act, namely on 4th *July* 1838, the company had

which shall be so abandoned or given up by the said company shall pass, revert to and vest in the owners for the time being of the land adjoining," under regulations specified in the act.

Stat. 1 & 2 Vict. c. lxxxi. (local and personal, public) is "To amend and enlarge the powers and provisions of the act relating to the *Eastern Counties Railway*." (Royal Assent, 27th *July*, 1838.)

Sect. 1 recites the passing of stat. 6 & 7 W. 4. c. cvi., and enacts that all its powers, provisions, &c., shall extend to the present act, and the purposes and things thereby authorized or required to be done, as if therein re-enacted.

Sect. 2 enacts "that the time by the said recited act limited for the compulsory purchase, taking or using of lands for the purpose of the said undertaking shall be and is hereby extended and enlarged for the further term of two years, to be computed from the expiration of the period for that purpose limited by the said recited act: provided always, that after the expiration of one year from the passing of this act it shall not be lawful for the said company to deviate the centre line of the said railway as laid down on the plans thereof referred to in the said recited act, unless the said company shall at the expiration of the said period have set out and defined their line deviating from the line laid down on the said plans as aforesaid, and in such case the line so laid down and defined shall be the line to be adopted by the said company without deviation therefrom."

not

not agreed for, or caused to be paid for, deponent's property, or, to the best of his knowledge or belief, any of the other properties specified in the schedule, situated in *Suffolk* and *Norfolk*, saving the properties of a few persons who, with one exception, were agreed with before the act passed. He then referred to stat. 1 & 2 *Vict. c. lxxx.*, and stated that the year allowed thereby for setting out and defining the line was now very near expiring, and that the line had not yet been set out or defined, so far as regarded his property at least, by any visible landmarks, &c., according to the usual practice; and that he had been informed and believed that the line had not been set out, &c., in any manner, in respect to any of the other property specified in the schedule, situated in *Suffolk* and *Norfolk*. That the company had not yet agreed for, or caused to be paid for, the portion of his property required for the railway, or made any proposal to him; and that, to the best of his knowledge and belief, they had not yet agreed for, or caused to be paid for, any of the other lands required for the railway in *Suffolk* and *Norfolk*, excepting as aforesaid. That deponent offered no opposition to either act, from a belief that the communication to be established by the railway between *Norfolk* and *London* would be a great benefit to himself, as the owner of land, and to the whole county of *Norfolk*, as well as the other counties and districts which the railway was designed to intersect. That he was suffering great inconvenience and prejudice in the possession and enjoyment of his property, from the uncertainty of the line which the railway was to take: and that he was informed and believed that, unless the line, as described in the plan deposited

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sited with the clerks of the peace (under stat. 6 & 7 *W. 4. c. cvi. s. 7.*), were carefully revised, and many needful deviations fixed and determined, and the whole line, or considerable portions thereof, fixed and defined anew, before 27th *July* 1839, it would be difficult or impossible to carry out the railway through *Suffolk* and *Norfolk*, according to the line originally laid down. That he had been informed and believed that, of the capital of 1,600,000*l.*, which the company were authorised to raise among themselves (stat. 6 & 7 *W. 4. c. cvi. s. 3.*), 600,000*l.* had already been paid up, and that the company had also borrowed considerable sums, and had therefore ample means of defraying the expense of setting out and defining the whole line from *London* to *Norwich* and *Yarmouth*, and paying for all the properties required for it: but that they had expended all that had come into their hands on the part of the line between *London* and *Colchester*, excepting sums, not exceeding 1500*l.*, paid for lands in *Norfolk* and *Suffolk*. That the deponent had been informed and believed that the company had entered into several large contracts for the completion of the line between *London* and *Colchester*, and for providing a carrying establishment for the working thereof when completed, and that they were about to enter into other contracts for the same purposes; but that they had not yet been able to make, nor did they contemplate making, any provision for setting out, executing, or working the line beyond *Colchester*; and that it was the intention and determination of the company not (unless compelled) to carry the railway farther than *Colchester*. That deponent consented to the enlargement of the company's power under stat. 1 & 2 *Vict. c. lxxxi. s. 2.* on the faith that
the

the line would be set out and defined, and that the parts of his property required for the railway would be paid for, within the enlarged time.

There were also affidavits by other parties, including proprietors, containing statements to shew that stat. 6 & 7 W. 4. c. cvi. was obtained upon evidence, in part, of the advantages which would accrue to *Norfolk* and *Suffolk* from the completion of the railway; and that the concurrence of parties in *Norfolk* and *Suffolk* was given upon the understanding that it should be carried through those counties; and it was stated that a scheme for making a different railway from *London* to *Norwich* had been abandoned in favour of the scheme of the present defendants. There was also an affidavit by a civil engineer, stating that he had had great experience in railways, and never knew an instance of a railway of any considerable extent being executed without numerous deviations being found requisite from the line originally laid down; that, from his knowledge of the line laid down for the Eastern Counties Railway, it was highly probable that numerous deviations therefrom, within the limits laid down by the acts, would be necessary; and that, in order duly to set out and define such deviations by the 27th *July* next, it was in his opinion absolutely necessary that the setting out and defining the same should be commenced without delay.

Other statements were added to shew a demand and refusal; and that the company had, in effect, abandoned the intention of carrying the railway beyond *Colchester*.

In answer, one of the directors made affidavit that he was advised and believed that the power to make deviations rested in the discretion of the directors. That he had been informed by the engineer of the company,

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and believed, that, in making the line through *Suffolk* and *Norfolk*, deviations would not be necessary. That the directors had proceeded in the execution of their powers to the best of their judgment and ability. That they believed the best course, for the advantage of the shareholders and public at large, to be, to make the line continuous from *London* to the interior of the districts through which the railway was to pass, finishing and opening portion by portion, as in their judgment might be best calculated to promote the prosperous issue of the undertaking, and the interest of the shareholders and the public. That they intended opening the line from *Romford* during the present *June* (1839), and to proceed in making the line between *Romford* and *Chelmsford*. That it was customary for the directors of railway companies to apply, from time to time, to parliament for an extension of time. That deponent, from his own knowledge, believed that the company would not be able to complete the line without raising further sums by the authority of parliament. That he believed it would be imprudent to purchase further lands, inasmuch as all the available funds would be employed with more benefit to the public in completing the works already in hand, and extending them over the lands already purchased. That, to purchase further lands, it would be necessary to apply to parliament (first obtaining the consent of the shareholders) for power to raise more money by loan or otherwise. That, if the directors were interrupted in gradually completing the line from *London* towards the interior of the districts, the works at present in operation between *London* and *Colchester* must certainly be discontinued. Statements were added to shew that the plan at present contemplated

plated by the directors was generally approved of by the shareholders.

The engineer of the company deposed that, although deviations from the line of railway were frequently made, and some had been made in the Eastern Counties' Railway, and others might be advisable, yet none would be necessary : and that it would not be difficult to carry out the railway to *Suffolk* and *Norfolk* in the precise line laid down.

Sir *F. Pollock*, *Alexander*, and *Austin*, now shewed cause (a). There is no precedent for such an application as this ; and the facts shew no obligation upon the company. Sect. 6 of stat. 6 & 7 *W. 4. c. cvi.* describes the termini, *Shoreditch* on the one end, and *Norwich* and *Great Yarmouth* on the other : but it only gives the company power to perform the work, and does not impose an obligation. *Rex v. The Proprietors of the Birmingham Canal Navigation* (b) is in point. Sects. 222, 223, shew that the framers of the act distinctly contemplated the possibility of the company completing a part only of the railway ; and indeed the words "if any," in s. 223, shew that the possibility of no part being completed was within the view of the legislature. The compulsory powers are to cease if the railroad be not completed : how could a mandamus issue to command the doing of that which the legislature had incapacitated the party from doing ? By sect. 254 provision is made for the abandonment by the company of all or part of the railway. Sect. 246 also shews that the legislature recognised the possibility of the funds not being sufficient for the completion of

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(a) Before Lord Denman C. J., *Littledale*, *Patteson*, and *Williams Js.*

(b) 2 *W. Bl.* 708.

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the work; and, in that case, it is left open to the company whether or not they will raise more money for the purpose. Sect. 222 allows two years (ending 4th *July* 1838) for the continuance of the compulsory powers of the company; and in seven years (on 4th *July* 1843) all their powers are to cease, except as to so much as is completed (sect. 223); and, by stat. 1 & 2 *Vict. c. lxxxii. s. 2.*, the continuance of the compulsory powers is enlarged for two years longer (to 4th *July* 1840): and till the expiration of that time no one is entitled to assume that any part of the work is abandoned; *Lee v. Milner (a)*. Sect. 55 of stat. 6 & 7 *W. 4. c. cvi.* authorises a deviation to a certain extent; and this power, by sect. 2 of stat. 1 & 2 *Vict. c. lxxxii.*, ceases on the 27th *July* 1839: but it cannot thence be presumed that a deviation is necessary, especially as the affidavits negative this: nor, at any rate, can the company now be called upon to determine what deviations they may find it necessary to make hereafter. The direction of the affairs of the company, by sect. 144 of stat. 6 & 7 *W. 4. c. cvi.*, is in the hands of the directors: shareholders have a voice in electing the directors, by earlier sections, but cannot control their discretion, otherwise than under the sections relating to general meetings. At any rate, this Court will not interfere between the members; *Rex v. The Bank of England (b)*, *Rex v. The London Assurance Company (c)*, *Rex v. The Benchers of Lincoln's Inn (d)*, *Rex v. Alsop (e)*. Strangers have no right to interfere in any way with the affairs of the company. Some of the deponents are landowners: but, if their land be taken by the company, their interest in it ceases; if not,

(a) 2 *M. & W.* 824.

(b) 2 *B. & Ald.* 620.

(c) 5 *B. & Ald.* 899.

(d) 4 *B. & C.* 855.

(e) 2 *Show.* 170.

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they are mere strangers. The company cannot be called upon to purchase lands before they want them. The affidavits suggest that the funds are exhausted: but can a mandamus go to compel the company to raise more money? What is the suggestion of the mandamus to be, and what return can be made? In *Rex v. The Severn and Wye Railway Company* (a) a company were compelled by mandamus to reinstate the railway which they had taken up, the act there providing that all persons should have free liberty to use the railway: but Abbott C. J. said that the writ should not go to compel the company to maintain the railway, after they had reinstated what they had taken up. And there the company had actually received tolls. Here, as to the part in question, the railway has never been laid down, nor have any tolls been received. No profit can be made till that is done which the mandamus is asked for to compel. This circumstance distinguishes the case from the two cases of *Rex v. Cumberworth* (b) and from *Rex v. Edge Lane* (c). Further, a mandamus does not lie where there is a specific remedy: and here the statute specifically lodges the discretion in the directors, or in the general meeting, to one of which therefore application should be made. *Rex v. The Paddington Vestry* (d) shews the reluctance of the Court to interfere by this writ without absolute necessity. Again, a mandamus will not be granted till there has been a distinct application and refusal; *Rex v. The Brecknock and Abergavenny Canal Company* (e), *Rex v. The Wilts and Berks Canal Company* (g). Here no application and refusal appear.

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(a) 2 B. & Ald. 646. See *Regina v. Gamble*, 11 A. & E. 72.

(b) 3 B. & Ald. 108.; 4 A. & E. 731. (c) 4 A. & E. 723.

(d) 9 B. & C. 456. (e) 3 A. & E. 217. (g) 3 A. & E. 477.

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Sir *J. Campbell*, Attorney General, *Cresswell, Kelly*, and *O'Malley*, contra. It is a recognised principle, that a statute of this kind is to be interpreted as a contract between the public and the company. The act here is for a railway, not from *London* to *Colchester*, but from *London* to *Norwich* and *Great Yarmouth*. And, had the undertaking been confined to a railroad from *London* to *Colchester*, the act perhaps would not have passed. A party who has a house on the line between *London* and *Colchester* may have consented on the ground that he has an estate between *Colchester* and *Norwich*, which latter will be benefited by the railway being completed. Indeed, the affidavits shew that another plan failed, in consequence of the company undertaking the whole. Lord *Eldon's* language in *Blakemore v. The Glamorganshire Canal Navigation* (a) applies. The Court of Chancery would prevent the execution of any part of the railroad if it appeared that the intention was not to complete the whole. If trespass had been brought for an entry upon the lands by the company, the defendants could not have justified entering for the purpose of making a road from *London* to *Colchester*, as is clear from *Rex v. Cumberworth* (b). And this Court interferes by mandamus, not only where there is an entire absence of other remedy, but also where there is no other remedy capable of giving effectual relief; *Rex v. The Severn and Wye Railway Company* (c). It is contended that the intention not to complete does not appear till the time is out; but, if

(a) 1 *Mylne & Keen*, 162.

(b) 3 *B. & Ad.* 108. See *Rex v. Cumberworth*, 4 *A. & E.* 731.; *Rex v. Edge Lane*, 4 *A. & E.* 723.

(c) 2 *B. & Ald.* 646.

so, there could be no mandamus till the act required had become impossible. If there be an intention to perform, and if all steps now necessary have been taken, that may be returned. It is attempted to represent this as merely a dispute between different members of the company: but the affidavits shew that the public are interested. The clauses depriving the company of their power after a certain time do not relieve them from their duty to the public. The privileges cease, but not the obligation: and it becomes the more important that the company should be immediately forced to act. The discretion of the directors is not absolute, but must be exercised in conformity with the statute. The cases of refusal by the Court to interfere in matters merely between different members of companies, (as *Rex v. The Proprietors of the Birmingham Canal Navigation* (a)) have no relevancy here. The want of funds is no answer: the act was obtained on the faith that funds could be obtained; and the company must raise them. Then the application and refusal are sufficient. [Lord Denman C. J. No objection can, we think, be taken to the sufficiency of the application and refusal, after the merits have been discussed: that is a point which ought to be raised in the first instance (b).]

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Cur. adv. vult.

(a) 2 W. BL 708.

(b) In *The Queen v. Parrott*, November 11th, 1839, where cause was shewn against a rule for an information in the nature of a quo warranto (made absolute November 12th), the same regulation was announced by Lord Denman C. J., as having been determined upon by the Judges of this Court. The case itself decided no point, and will therefore not be reported at this stage.

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Lord DENMAN C. J., in the vacation after this term (21st *June*), delivered the judgment of the Court.

This was an application for a mandamus to do certain acts therein specified; and it was observed, on both sides, in the course of the discussion, and we think with great truth, that the questions involved in it are of much novelty, and of, at least, equal importance. Because, as, on the one hand, much mischief may ensue, if this Court should improvidently enjoin the performance of things impracticable or improper, so, on the other, is there no higher duty cast upon this Court than to exercise a vigilant control over persons entrusted with large and extensive powers for public purposes, and to enforce, within reasonable bounds, the exercise of such powers in compliance with such purposes; and the more so, as we are not aware of any other efficient remedy. The principles upon which these powers are conferred by the legislature upon undertakings of this description are now so fully understood that it is not needful to do more than generally to refer to them. They are thus laid down by Lord *Eldon* in the well known case of *Blakemore v. The Glamorganshire Canal Company* (a) — “I apprehend those who come for” these acts “to parliament, do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else: that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public, as with reference to the interests of individuals.”

The same doctrine was acted upon by this Court, *its*

(a) 1 *Mytne & Keen*, 162.

its fullest extent, in the case of *Rex v. Cumberworth* (a). It remains only to add that these cases and principles have been recently recognised by the Court of Exchequer in the case of *Lee v. Milner* (b).

The reasons, also, which regulate the practice of this Court in regard to writs of mandamus, are very plain and intelligible. Its interference is occasioned by inferior Courts or persons refusing to proceed in some course prescribed by law, and not in consequence of any misapprehension or error in that course, provided they have entered upon it. And, accordingly, if it had appeared that the company were substantially complying with the terms of their undertaking, there would have been, at once, a satisfactory answer to the application.

Now the objects and purposes for which this company has been incorporated and empowered, or, in the words of the passage cited, what the legislature has empowered and compelled them to do and to submit to, are too clear to admit of any doubt. The title of the act itself "for making a railway from *London to Norwich and Yarmouth*," the benefits recited in the preamble as likely to result from opening a communication, not only between the towns there more particularly enumerated, but also between the metropolis and the eastern districts of the kingdom, from which it is alleged that "*great public advantage*," would result, the eastern terminus being a sea port of greater consequence than any in those eastern districts, together with a minute description of the whole line, and a particular enumeration of all the places through which it is to pass, precludes all question on this matter.

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(b) 2 M. & W. 824.

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We consider it to be equally undeniable that to carry the railroad through a portion only of the described line, such as a third or a half, is a nominal, and not a real, compliance with the meaning of the act of parliament.

We are aware that we were met, in this part of the argument, by remarks upon the difficulty or impossibility attending the execution according to the prescribed terms. We confess, however, that we should have felt more pressed by observations of this nature if we had not observed in the preamble of the act, which we must consider to have been proved, that certain persons therein named (and we consider the obligation as extending to their successors who, from time to time, may constitute the company) were "willing at their own costs and charges to carry the said undertaking into execution." Such difficulties, be they more or less, should have been duly estimated before the undertakers pledged themselves to the execution for the sake of obtaining such large and extensive powers as most certainly are vested in them for the purposes already mentioned. It was urged, also, that the time for completing the work is not yet elapsed, and the time for determining their line not yet arrived. We were also referred to parts of the act (and particularly to the clause revesting the land taken for the line in the proprietors on the one side), as indicating that the non-completion of the work was obviously within the contemplation of the legislature.

We think, however, that a failure of the enterprise upon experiment and trial (which may, of course, happen to any scheme, however plausible or promising) widely different from a design to abandon one part

the line and to execute another which it may be found more easy and profitable to accomplish.

Another argument against our interference was drawn from the power given to a general meeting of the company to decide upon the expediency of all measures to be adopted for executing the act of parliament. But we must consider the real nature of this application. It is not a complaint by the majority of the proprietors against the governing body, but by a minority against the conduct of the company itself, which they charge substantially with a breach of faith towards them by stopping short of a bonâ fide execution of that purpose which induced them to become subscribers. They strongly urge upon us the consideration that all the sacrifices which they may have made in furtherance of their own interests may go unrequited, or even may entail upon them additional loss by giving advantages, in which they cannot share, to their competitors in turning property to account. To say that a majority of the whole body are satisfied with the dividends they now receive, and unwilling to risk more expenditure, is obviously no answer to them, or to the public which created these great powers for different purposes, or to parliament which was induced to grant them by the promise of public benefits much more extensively diffused.

We now come to consider whether, so far as appears to us, there be a bonâ fide purpose of completing the work. And, upon this part of the case, after making every possible allowance for the discretion to be exercised by the company as to the different degrees of exertion to be made in different parts of the line, it is impossible not to be forcibly struck by the different
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state of things beyond *Colchester*, and between that town and *London*. Beyond, we can discover no activity: whereas between *London* and *Colchester* we are given to understand that the whole line is in a state of great forwardness. The procuring land for the line is usually, we believe, as reasonably might be expected, the first step in these cases. And yet, in this preliminary measure, the preparation beyond *Colchester* we perceive to be comparatively small and insignificant. Moreover, when we consider how indispensable for purposes of this description is the compulsory power of procuring land (because without it the obstinacy or caprice of a single individual may put a stop to the work at once), we cannot help thinking that the answer of the company to a request "that they would set out and define their line deviating from the line laid down in the plans" (a mere precautionary measure to secure compulsory purchase), "that no deviation is necessary," is much more consistent with a determination not to proceed, than a well founded belief that the original plan could have been laid down with such perfect accuracy as, in working, to require no deviation at all.

Upon the whole, without coming to any final decision, we think the case is involved in sufficient doubt to require a return to the mandamus; and that the writ should go for that purpose.

Rule absolute.

The mandamus issued, tested 12th *June*, 2 *Vict.* (1839). The suggestion was as follows.

Whereas, by an act &c. (stat. 6 & 7 *W. 4. c. cvi.*), it is amongst other things recited that &c. (referring to sects. 1, 6, 9, &c.); and whereas, by another act &c. (stat.

(stat. 1 & 2 *Vict. c. lxxxii.*), it is amongst other things enacted and provided &c. (referring to sect. 2): the writ then suggested that the said persons so named or described in the said first-mentioned act, and so incorporated, did take upon themselves the execution of the said two several acts of parliament, and of the several powers and provisions therein respectively contained; and that, in pursuance thereof, they had purchased lands for the use of the said undertaking, and had begun to make, and in part had completed, the said railway between *London* and *Colchester*, but that they had not made any sufficient provision for setting out, executing, or working the line of the said railway beyond *Colchester*, or in *Norfolk* and *Suffolk*. That one *Charles Symonds*, of the town of *Great Yarmouth* in *Norfolk*, was the owner of a certain farm, cottage, yard and barn, orchards, and garden, situate in the parish of *Witheringsett* in *Suffolk*, which were described in the schedule to the first-mentioned act of parliament, and through which said farm and lands the centre line of the said railway, as laid down in the plans thereof referred to in the said first-mentioned act, ran. And that he "has required you, the said Eastern Counties' Railway Company, to set out and define the line of the said railway deviating from the line laid down on the plans in the said last-mentioned act in that behalf referred to, and to proceed to make and complete the said railway from *London* to *Norwich* and *Yarmouth*; yet you, well knowing" &c., "but not regarding" &c., "have absolutely refused and neglected, and still do refuse and neglect, to purchase the lands necessary to the making and completing the said railway, and lying between *Colchester* and *Norwich*, and between
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Norwich and *Yarmouth* aforesaid, or to set out and define the line of the said railway, deviating as aforesaid, or to make and complete the said railway according to the provisions of the said act of parliament. In contempt" &c., "and to the great damage of the said *Charles Symonds*, and to the manifest injury of his estate" &c.

The writ then commanded the company "that, immediately after the receipt of this writ, you do proceed to make and complete a railway from *London* to *Norwich* and *Yarmouth*, passing by *Romford*, *Chelmsford*, *Colchester*, and *Ipswich*, according to the provisions of the said act of parliament" &c., "and of the said other act" &c., "and especially that you set out and define the line of the said railway, particularly that part thereof lying between *Colchester* and *Norwich*, and *Norwich* and *Yarmouth*, deviating from the line laid down on the plan in the said last-mentioned act in that behalf referred to. And that you proceed to purchase the lands necessary to the making and completing the said railway, and lying between *Colchester* and *Norwich*, and *Norwich* and *Yarmouth* aforesaid, pursuant to the provisions of the said several acts of parliament in that behalf contained. Or that you shew us cause" &c.

Return (of 2d November 1839). "That the ~~said~~ *Charles Symonds* has not required us to set out ~~and~~ define the line of the said railway deviating" &c., "~~and~~ to proceed to make" &c., "in manner and form" "~~and~~ "That we have set out and defined the line of the ~~said~~ railway, particularly that part thereof lying between ~~and~~ *Colchester* and *Norwich*, and *Norwich* and *Yarmouth* ~~and~~ deviating from the line laid down on the plans in said act of parliament in the said writ first ~~mentioned~~

tion ~~and~~

ioned, and in that behalf referred to, pursuant to the provisions of the said several acts of parliament in that behalf." "That we" "have, from the time of the passing of the said act of parliament in the said writ first mentioned hitherto, exercised a reasonable discretion, option, and judgment, in making and completing the said railway, and in compulsorily requiring making, using, agreeing for, or causing to be valued and paid for, all and every of such lands as we are by the said act of parliament in the said writ first mentioned empowered to take or use as aforesaid. And that we have, in exercise of such reasonable discretion, option, and judgment as aforesaid, proceeded to make and complete, and have made and completed, certain large portions of the said railway, and have purchased, as well all and every of such lands as are necessary to the making and completing the said railway and other works by the said last-mentioned act of parliament authorised between *London* and *Colchester* in the county of *Essex*, as also a certain large portion of the lands which are necessary to the making and completing the said railway and lying between *Colchester* and *Norwich*, and *Norwich* and *Yarmouth*, which said last-mentioned lands are all of the lands so lying between *Colchester* and *Norwich* and *Norwich* and *Yarmouth* which we," "in the exercise of such reasonable discretion, option and judgment as aforesaid, and in execution of the powers of the said several acts of parliament respectively in the said writ mentioned, and for the purposes thereof, have deemed expedient and proper to purchase before and at the time of the issuing of the said writ of mandamus, or at any time since, for the purposes of making the said railway and other works by the said acts of parliament authorised."

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“That, in execution and in pursuance and by virtue of the powers and provisions of the said act of parliament in the said writ first mentioned, and for the purposes of making and maintaining the said railway and other works by the said last-mentioned act authorised, and before and at the time of the issuing of the said writ of mandamus, divers subscriptions, calls, and sums of money had been subscribed and paid up to us by the several persons who have at any time subscribed, or agreed to advance or pay any monies, for or towards the making and maintaining the said railway and other works by the said last-mentioned act authorised. And that we had also, for the purposes last aforesaid, before and at the time of the issuing the said writ of mandamus, borrowed and taken up at interest, on the credit of our said undertaking, a certain other sum of money; and that we had also, in divers ways and at divers times before and at the time of the issuing of the said writ of mandamus, received, to and for the use and benefit of our said company, divers other sums of money; which said several sums of money, so raised, borrowed, taken up, and received respectively, as aforesaid, amount together to a large sum of money, to wit, the sum of 953,045*l*.” That we “have partly laid out and expended and applied the said sum of money last mentioned in paying and discharging all costs and expenses incurred in applying for, obtaining, and passing the said last-mentioned act, and all other expenses preparatory or relating thereto, and partly in, for, and towards purchasing a certain large portion of the lands which we are by the said last-mentioned act of parliament empowered to take or use; and partly in making and maintaining the said railway and other works, and in otherwise

otherwise carrying the said acts into execution : and that the residue of the said sums, so raised, borrowed, taken up, and received respectively as aforesaid, amounting to a certain small sum of money, towit the sum of 9892*l.*, now remains in our hands undisposed of, unused, unappropriated, unapplied, and ready to be laid out and expended and applied in making and maintaining the said railway by the said acts authorised, and in otherwise carrying the said acts into execution : which said last mentioned remaining sum, together with the residue of the monies which we are by the said acts of parliament empowered and authorised to raise, borrow and take up, demand, or receive, for the purpose of making and completing the said railway, is wholly inadequate and insufficient for the purchase of the lands necessary to the making and completing the said railway lying between *Colchester* and *Norwich*, and *Norwich* and *Yarmouth* aforesaid, and for the making and completing the said railway in the said writ mentioned. And for these causes and reasons we, the said Eastern Counties Railway Company, have not proceeded to make and complete" &c., "according to the provisions of the said statutes in the said writ mentioned, in manner and form as by the said writ we are commanded."

In the following *Trinity* term (*a*),

Sir *J. Campbell*, Attorney General, moved, on concilium, to quash the return, and for a peremptory mandamus. First, the mandamus shews a duty not performed by the company, who were bound, if they

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(*a*) June 10th, 1840. Before Lord Denman C. J., *Littledale*, *Patterson*, and *Williams* Js.

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commenced the work, to complete it; and the only effectual remedy which *Symonds* can obtain is a peremptory mandamus. (On these points, he referred to the authorities cited in moving to make the rule absolute.) Next, the return furnishes no answer. It alleges that *Symonds* had not required the company to do the acts: but that is an objection which can be raised only against granting the rule for a mandamus. The damage done to *Symonds* is not traversed. Then the company return, in substance, that they have performed as much as, in their discretion, they think proper to perform. But they have no discretion at all as to completing the railway which they have commenced: the mode of execution, and other matters not involving the question whether the railway be or be not completed, may be in their discretion; but nothing more. It is true that in *Rex v. The Ouze Bank Commissioners* (a), it was suggested by some of the learned Judges that the return might have been sufficient if it had alleged that the commissioners thought certain things necessary, and had done them. But there, although a discretion was lodged in the defendants, a peremptory mandamus was awarded. And it was held that the word "forthwith," in the mandamus, meant that the defendants were to set about the works directly, and do what they could; the performance of which should appear by the return. Here it is not pretended that the company have done all they can do. The defendants return that from subscriptions, calls, loans, and other sources, they had, before the writ issued, raised 953,045*l.*, of which all has been expended on the undertaking except 9892*l.*; which last sum, together with all that they are authorised to raise, borrow, &c.,

(a) 3 A. & E. 544.

insufficient for completing the railway as commanded by the writ. Now sect. 3 of stat. 6 & 7 W. 4. c. cvi. authorises them to raise 1,600,000*l.* by shares. The whole of this must have been subscribed for (sect. 220), and the fact certified, to enable the company to exercise their compulsory power of taking lands. By sect. 246 they may raise, in addition, 533,333*l.*, on the credit of the undertaking, or (sect. 252) by increase of capital. The main allegation in the return suggests no traversable fact: for how could issue be joined on the question whether what remains of the 2,133,333*l.* would suffice for the completion of the railway? But, further, it is not competent to the company to allege the insufficiency of their means. By sects. 1 and 3 they, in effect, engage to complete their work with the 1,600,000*l.*; at any rate they are pledged to complete it with the 2,133,333*l.* If these funds be insufficient, the company is bound to use so much as will suffice: *Rex v. The Commissioners improving Market Street, Manchester* (a), *Rex v. Mayor of Wells* (b). In *Rex v. Round* (c) a return was made in good which shewed the impossibility of performing what the writ commanded; but the impossibility there shewn, not, as here, by averring facts in-

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Note (a) to *Rex v. The Hungerford Market Company*, 4 B. & C. 1.

Dowl. P. C. 562. The Attorney General referred also to a case *as v. The Commissioners of the South Level Drainage and Navigation for the South Level of the Fens*, in which the Court made the rule absolute to perform certain works absolute, though there were that the defendants had not sufficient funds. Trin. Term, 1838, Not reported. The Court, in making the rule absolute, merely would be better that a return should be made. Sir W. W. Follett on the present argument, that the commissioners there had power to do so; but this fact was disputed. The reporters have not any return was made to the mandamus.

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consistent with the original duty, but by denying the suggestion in the writ upon which alone the duty could be founded at the time when the writ issued. And even that case has been questioned in this Court on some points (a).

Sir *W. W. Follett*, *contra*. The prosecutor might have traversed this return; or, if he meant to question its sufficiency, he might have demurred; and then the whole question of law, including that upon the goodness of the mandamus itself, might have been carried up to a court of error. [*Patteson J.* In *Rex v. The Lord of the Manor of Oundle* (b) a concilium was deemed to be the proper way of raising the question of law.] The decision there was that, after the award of a peremptory mandamus, the Court would not compel the prosecutor to demur to the return. It seems, however, that the officers of this Court consider that error would not lie on a judgment upon such a demurrer (c).

This mandamus cannot be supported. The statute is permissive, not imperative; and the mandamus can command no more than the defendants can perform. The funds can be raised only by subscription or loan: but the company have no power to compel parties either to subscribe or to lend money. And, till the subscriptions reach the amount of 1,600,000*l.*, there is, by sect. 220 of stat. 6 & 7 *W. 4. c. cvi.*, no power of proceeding. The mandamus does not suggest that the subscription has reached this sum, and shews no power in the company. (He went into other arguments, which

(a) See *Regina v. Payn*, *Easter term*, 1840: post. (b) 1 *A. & E.* 297.

(c) Stat. 9 *Ann. c. 20. s. 2.* enables the prosecutor to plead to, or traverse, the return; and the party making the return to reply, take issue, or demur.

had

had also been urged against the rule.) It is contended that the company are estopped from alleging that they have no funds; and it is true that, as a matter of evidence, a party may be bound by his own admissions, express or implied: but, when the question is whether he is to be ordered to do a thing, the Court must look at the actual state of facts, to ascertain whether the thing commanded be possible or not. The return here expressly states the inability of the company, for want of funds. A mandamus issues to compel the performance of that which a party ought to do and can do: not to punish him for not having done that which he ought to have done, but now cannot. If the company have failed in their duty, they are liable to indictment: *Rex v. The Severn and Wye Railway Company* (a) has been doubted. [Littledale J. An indictment would merely act by way of punishment.] The same may be said of a peremptory mandamus, if disobeyed. It is not uncommon for parties to obtain an act of parliament, and then not avail themselves of it; but it never was before attempted to force them by mandamus to use their powers. Where the funds are insufficient, the Court of Chancery will restrain the undertakers from proceeding; how then can this Court command them to proceed? In *Mayor, &c. of King's Lynn v. Pemberton* (b) it was held that commissioners, authorised by statute to perform certain works to which they were to appropriate certain funds, might cut through land of *their own*, while their funds were insufficient to complete the works, and pending an application to parliament for further powers

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(a) 2 B. & Ald. 646. See *Regina v. Gamble*, 11 A. & E. 72.

(b) 1 Swanst. 244.

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to raise money: but there Lord *Eldon* said, "The circumstance of their not cutting through your lands distinguishes this case most materially from every other of the kind. In the case of *Agar* and the *Regent's Canal Company*, I acted on the principle, that where persons assume to satisfy the legislature that a certain sum is sufficient for the completion of a proposed undertaking, as a canal, and the event is that the sum is not nearly sufficient, if the owner of an estate through which the legislature has given to the speculators a right to carry the canal, can shew that the persons so authorised are unable to complete their work, and is prompt in his application for relief grounded on that fact, this Court will not permit the farther prosecution of the undertaking." In *Thicknesse v. The Lancaster Canal Company* (a) it was held that, where an act of parliament limited no time for the performance of a work, the undertakers might intermit and resume the works whenever they pleased, and that they were not restricted to what might be held a reasonable time. There, if a mandamus had been applied for to enforce the completion, it is clear that the Court could not have granted it, as they could not interfere with the discretion.

The authorities cited on the other side shew that those who possess such powers cannot impose a burthen without performing all the work which is to be an equivalent; but they do not shew that the parties can be compelled to proceed. Such are *Blakemore v. The Glamorganshire Canal Navigation* (b), the two cases of *Rex v. Cumberworth* (c), and *Rex v. Edge Lane* (d). In *Rex v. The Hungerford Market Company* (e), and *Rex v.*

(a) 4 M. & W. 472. *

(b) 1 Mylne & Keen, 154.

(c) 3 B. & Ad. 108.; 4 A. & E. 731. (d) 4 A. & E. 723.

(e) 4 B. & Ad. 327.

The Commissioners for improving Market Street, Manchester (a), commissioners, having bound themselves by notice to a party to take his land, were held incapable of retracting, and a mandamus issued to enforce compensation; but these cases rest on a principle altogether foreign to that contended for; and it cannot be inferred from them that a mandamus would have lain to enforce performance of the work, especially if it had appeared that there were no funds. A corporation having power to hold a court may be compelled to do so by mandamus, though the court has been discontinued for two hundred years; *Rex v. Mayor of Wells* (b): but there the charter imposed a public duty, which the corporation could not abandon without surrendering the charter. The only attempt like the present was in *Rex v. The Proprietors of the Birmingham Canal Navigation* (c); and there the mandamus was refused; and the utmost length that any of the court went in favour of such applications was to throw out that perhaps a refusal to complete the work from sinister motives might be a ground for a mandamus. *Rex v. The Ouze Bank Commissioners* (d) was decided on the form of the return. *Rex v. Round* (e) proves that a return shewing an impossibility is sufficient. The mandamus here does not shew that the company have the funds, or power to take lands, or that there has been any unreasonable delay, but simply that no arrangements have been made for carrying on the works, which might have been said the moment the act had passed. Who has the discretion as to the time

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(a) 4 B. & Ad. 333.; note (a).

(b) 4 Dowl. P. C. 562.

(c) 2 W. Bl. 708.

(d) 3 A. & E. 544.

(e) 4 A. & E. 139.

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besides the company? The return shews that the only effect of a peremptory mandamus would be to imprison the parties for life; since the power to complete is entirely negatived. If the mandamus be not good for all that it commands, it is bad altogether (a); now it must be bad as to all for which the funds are not adequate.

Cresswell (in the absence of the Attorney General) in reply. That the prosecutor has not traversed any allegation in the return, arises from the return presenting no material fact: no traverse could be taken which would not be objected to for immateriality. It is said that the mandamus is bad, because it demands, at any rate, more than can be performed, for want of funds. But the writ shews, *primâ facie*, a power to complete the whole work, by referring to the statute which the defendants have obtained for that purpose. The writ does not become bad in itself by an allegation of inability first introduced by the return.

Then the general question is, not merely whether the statute be permissive as to the whole or imperative as to the whole, but whether, the company having partially availed themselves of the statute, it be not now imperative as to the rest. It is contended that the insufficiency of funds would be ground for an injunction to restrain the company from proceeding, and, therefore, that it would be inconsistent to compel them to proceed in the absence of funds. But, if the argument on the other side were correct, it would be sufficient answer to an application for an injunction, that the com-

(a) See *Rex v. The Church Trustees of St. Pancras*, 3 A. & E. 535.

pany had funds for a part, though not for the whole. Indeed, the prosecutor may urge that an injunction would be granted to restrain the company from proceeding with any part if they were unwilling or unable to execute all: and this agrees with the language of *Parke B.* in *Lee v. Milner* (a). The argument for the defendants, as to this, must go the length of contending that they have no title to the part already completed. In order to make *The Mayor, &c. of King's Lynn v. Pemberton* (b) and *Agar v. The Regent's Canal Company* (there cited) applicable, the defendants must contend that the undertakers in these cases might have been restrained from proceeding on account of their failing to provide funds, on a suggestion by themselves, setting up their own default. In *Thicknesse v. The Lancaster Canal Company* (c) and *Lee v. Milner* (d) no intention to abandon was proved. In *Rex v. The Proprietors of the Birmingham Canal Navigation* (e) the commissioners were to make the canal "as may be found convenient;" which expressly gave a discretion: the present case more nearly resembles that, put by Lord *Ellenborough* (g), of trustees appointed by statute with power to provide lamps, who would be liable to indictment if they did not provide as many as were necessary. The acceptance of an act of parliament binds as much as the acceptance of a charter: the defendants therefore are here in the same position as the defendants in *Rex v. Mayor of Wells* (h). It is urged that the mandamus

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(a) 2 M. & W. 839.

(b) 1 Swanst. 244.

(c) 4 M. & W. 472.

(d) 2 M. & W. 824.

(e) 2 W. Bl. 708.

(g) Probably referring to *Harris v. Baker*, 4 M. & S. 27, 29.

(h) 4 Dowl. P. C. 562.

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ought to shew that there are sufficient funds. Now the mandamus does shew that the defendants have executed part of the work; and this they were not authorised to do (stat. 6 & 7 W. 4. c. cvi. s. 220.) till the sum of 1,600,000*l.*, sufficient to meet "the probable expense of making the said railway and other works," was raised. It is also argued that this application might as well have been made the moment after the act was passed; but the fact insisted upon by the prosecutor is the length of time which has elapsed without completion of the work, the whole time, within which the work can be done, being limited. Then it is contended that there can be no default while any time remains: if that were so, there could be no remedy; for, when the time has elapsed, the works cannot be performed. As to the objection that the mandamus alleges nothing traversable, the refusal to complete the work, which is alleged, is a material traversable fact.

Then, the mandamus having commanded the defendants to do what is necessary, the answer given is, that they have done what they please. It is asked, how it appears that the defendants will not purchase all that is necessary: the answer is, that they have not yet done so, and do not now say that they will. The return of want of funds should at any rate specify how much the company can raise, and how far that will go. All that now appears is that, because the company cannot raise enough for all that remains to be done, they will do nothing more. The allegations in the return as to funds are not traversable; and the defendants have already engaged with parliament that their funds are sufficient. Besides, this part of the return omits the income to be derived from tolls. The company

pany are at least bound to raise what they can, and apply what they raise, including the tolls, to the completion of the work from time to time.

Cur. adv. vult.

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Lord DENMAN C. J., in the same term (*June 16th*), delivered the judgment of the Court.

In this case the Court granted a mandamus to complete the works which the company had undertaken to execute, by virtue of the powers entrusted to them by an act of parliament. A return was made, the sufficiency of which being questioned, it was set down for argument, and has been very fully discussed before us.

The defendants, however, denied that the writ of mandamus itself was legal; and on that preliminary point it is therefore needful that we should first form our opinion.

We were told that our power to issue a writ of mandamus in any such case is at least doubtful; and were properly reminded that the form and method of proceeding may prevent our judgment from being revised by any court of error: a consideration which certainly ought to induce great caution in assuming jurisdiction, but cannot justify us in declining it where the law has lodged it with the Court. We have no more right to refuse to any of the Queen's subjects the redress which we are empowered to administer, than to enforce against them such powers as the constitution has not confided to us. It was urged that, our mandamus to compel obedience to an act of parliament implying a disobedience at present, the prosecutor may indict, and, having that remedy, does not require the extraordinary process of mandamus. This argument appears to prove too

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too much ; as it would prevent the Court from acting in all cases where an act of parliament is contravened. Besides, the indictment does not compel the performance, but only punishes the neglect of duty : though it was thought proper to remind us that mandamus might do no more, for that disobedience would only bring the party into contempt, and expose them to attachment, which would but end in individual suffering, and leave the required act still undone. Yet we are not in the habit of supposing that persons required to obey the Queen's writs issuing from this Court will incur the penalty of contempt for contumacy, or be advised to evade the known and ancient process of the law.

Objections were also raised to a mandamus for insuring the execution of these works. Under this head it was, in effect, insinuated that similar acts of parliament entail no duties whatever on those who may procure them ; that they do but offer a boon which the projected company may accept or reject, or partially accept and partially reject, at their sole will and pleasure. The assertion, appearing in them all, that they have provided the means of executing the intended works, was treated as no proof even *primâ facie* that they have sufficient funds for that purpose. The provision for disabling the company from taking land after the lapse of a certain term was put forth as a proof that they had full power to proceed with their works or abandon them, without any regard to the interest of others. Some decisions of the Court of Chancery, which have enjoined companies not to take possession of certain lands peculiarly circumstanced, were called inconsistent with any power in this Court to require that possession should be taken of lands under circumstances

tances entirely different. We think it right so far to advert to these remarks, that we may wholly disavow them as having at all conduced to the judgment which we are about to pronounce. When we made the rule absolute, we expressed our conviction that the case was in some respects new, and that its circumstances admitted of some doubt whether our power ought to be applied to them. We shall keep our minds open for the discussion of all such doubts on every proper occasion: but we do not yield to them; nor is it necessary to advert to them in coming to our present decision. We neither hold the Court incompetent to enforce execution of an act under the circumstances disclosed to us in the affidavits, nor think any of the reasons which we have enumerated are conclusive against making our mandamus peremptory.

Those points will be as much open to argument hereafter as they were when the rule was obtained.

But it will be perceived, on adverting to what was said on the former occasion, that we considered the acts then stated to afford strong evidence that the company, having obtained an act for a particular purpose, had stopped short of effecting it, and satisfied themselves with doing less than one half of what they had undertaken to do, and represented themselves to be capable of doing. It was by that undertaking and representation that they obtained the act, and the great powers of occupying land, and raising money, which it bestowed. We could not recognise their right to say to those who had contracted with them, and to the public, "Our undertaking does not bind us, because our statements were untrue; we have nothing to consider but the pecuniary interests of the company, and claim

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claim to exercise an unlimited option over these works and every part of them." The rule was made absolute, and the writ was directed to go, on the supposition that they had no intention to proceed bonâ fide with their works, and had on the contrary abandoned all intention to complete them.

But the prosecutors of the writ have stated no such facts. What they state may raise a suspicion on the subject, but falls far short of proof. The acts are recited in the inducement to the writ, especially the power to vary their line within a given time, or that otherwise they must abide by the line laid down in the plans. The writ proceeds to allege that *Charles Symonds* is the owner of lands near *Yarmouth*, enumerated in the schedule, and has required the company to set out and define the line of the railway deviating from that in the plans, and to proceed to make and complete the railway to *Norwich* and *Yarmouth*: "yet you, well knowing the premises, but not regarding your duty in that behalf, have absolutely refused and neglected, and still do refuse and neglect, to purchase *the lands* necessary to the making and completing the said railway, and lying between *Colchester* and *Norwich*, and between *Norwich* and *Yarmouth* aforesaid, or to set out and define the line of the said railway, deviating as aforesaid, or to make and complete the said railway according to the provisions of the said act of parliament"(a): and, afterwards (b), it commands the company to complete the whole road, to set out the deviated line especially, and to purchase the lands necessary for that purpose.

Here is no averment that the company have given up

(a) See pp. 549, 550, *antè*.

(b) This appears to refer to the mandatory part of the writ.

their

their design, or have wilfully exercised any injurious option, or that they are not effecting it with all convenient speed, or that even a reasonable time has elapsed in the opinion of the prosecutors without due preparations being made, or that it would not be more advantageous to all concerned to abide by the original line than set out and define a different one.

The gravamen rests in the simple form of a complaint, that the company has refused to purchase lands at the time when Mr. *Symonds* required them to do so. There is no inconsistency between this and the possible fact of their having done all that prudence authorised to obtain such lands at equitable prices, and refused to purchase because fair bargains could not be obtained. We can infer no fault; it must be distinctly charged; and the charge, as it stands, is quite insufficient, and falls decidedly below the case which we thought was made reasonably probable by the affidavits on both sides.

Judgment for the defendants.

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Wednesday,
June 12th.

COLLINS *against* YEWENS.

When a party is arrested in one action, he is in the custody of the sheriff in all actions in which writs have been delivered to the sheriff.

But, if the first arrest be illegal, the party cannot be detained under other writs without a fresh arrest.

Such fresh arrest is not prevented by the custody under the former illegal arrest, if there be no collusion.

But, if a sheriff's officer, having arrested without a warrant, procure, for the purpose of making the arrest good, his own name to be inserted in a warrant properly issued in an action to another officer, an arrest or detainer in this action will not warrant a detainment under a ca. sa. in another suit, which had been delivered to the sheriff before the first arrest, and no warrant issued on it: nor can the sheriff's officer resort to such last-mentioned writ to support the original arrest; but the Court will discharge the party to the prior suit. And this, though affidavit be made negating collusion between the plaintiff in the prior suit and the sheriff or his officer.

Quære, whether a defendant, since stat. 3 & 4 W. 4. c. 67. s. 2., can be arrested on judgment and ca. sa., both more than a year old, and the ca. sa. having issued within a year of the judgment, without a scire facias.

HUMFREY obtained a rule, in last *Easter* term, calling upon the plaintiff, the sheriff of *Middlesex*, and *Abraham Slowman*, officer to the said sheriff, to shew cause why the defendant should not be discharged out of custody in this action, he having been illegally arrested; and why the plaintiff, or the sheriff, or his officer, should not pay the defendant his costs occasioned by the arrest, &c. The facts will sufficiently appear from the judgment. In this term (a),

Kelly, on behalf of the plaintiff, and *Kennedy*, on behalf of the sheriff, shewed cause. They referred to *Howson v. Walker* (b), *Barratt v. Price* (c), *The Case of the Marshalsea* (d), *Drake v. Sykes* (e), and *Goodwin v. Lordon* (g).

(a) May 25th, before Lord Denman C. J., *Littledale, Patteson, Williams, Js.*

(b) 2 W. Bl. 823.

(c) 9 Bing. 566.

(d) 10 Rep. 68 b.

(e) 7 T. R. 113.

(g) 1 A. & E. 378.

r *F. Pollock* and *Humfrey*, contra, referred to
ce v. Stuart (a), *Barclay v. Faber* (b), *Rose v. Tomb-*
n (c), *Jacobs v. Jacobs* (d).

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Cur adv. vult.

ord DENMAN C. J. now delivered the judgment of
 Court. This was an application to discharge a
 defendant out of custody, on the ground that he was
 taken by the sheriff on a writ of *capias ad satisfac-*
lum at the suit of the plaintiff, having been ille-
 gally arrested in the first instance by one *Slowman*, who
 had no warrant; and it does not appear by the affidavits
 in this case that *Slowman* professed to arrest him. Also,
 on the ground that no *scire facias* had been issued to
 review the judgment, which was more than a year
 old).

It is unnecessary to give any opinion as to the second
 question, inasmuch as we decide in favour of the de-
 fendant on the first.

It appeared that *Slowman*, who arrested the defend-
 ant, was one of the officers usually employed by the
 sheriff, but who had no warrant in the particular case.
 The defendant was taken to the lock-up house of *Slow-*

3 *East*, 89.

(b) 2 *B. & Ald.* 743.

3 *Dowl. P. C.* 49. See p. 55.

(d) 3 *Dowl. P. C.* 675.

Judgment in *Collins v. Yewens* was entered on 25th May 1837;
ca. sa. issued the same day; the sheriff returned non est inven-
 tory on 28th September, 1837; and the succeeding sheriff made a similar
 return on 28th September, 1838. The judgment-roll had been carried
 to the treasury; and the returns had been entered thereon. No stress
 was laid on the returns, in the argument. On this point, the following
 authorities were referred to. Stat. 3 & 4 *W. 4.* c. 67. s. 2.; 2 *Chitty's*
Cr. L. p. 853, 6th ed. (but see ib. p. 818, 7th ed., and *Simpson v. Heath*,
 5 *W.* 631.); *Scott v. Whalley*, 1 *H. Bl.* 297.; *Ogilvie v. Foley*, 2 *W.*
 111.; *Taylor v. Hipkins*, 5 *B. & Ald.* 489.

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man; and, whilst he was there, *Slowman* obtained a warrant in this action at the suit of the plaintiff *Collins*, on a writ which was in the office before the arrest: but, as the warrant was issued subsequently to the arrest, he knew that it could not avail him; therefore he applied to one *Nathan*, a sheriff's officer who held a warrant against the defendant at the suit of *Richardson and another* (the only warrant which appears to have been issued before the arrest), and persuaded *Nathan* to give him up that warrant. *Nathan* indorsed it that it had not been executed by him; but *Slowman* procured his name to be inserted, and persuaded the sheriff that the defendant had been arrested under that warrant (a).

The general rule of law undoubtedly is that, as soon as a party is arrested in one action, he is considered to be in the custody of the sheriff in all actions in which writs have been issued and delivered to the sheriff; for, as Lord Chief Justice *Tindal* says in *Barratt v. Price* (b), "it would be only an idle and useless ceremony to arrest the defendant in the rest; it would be '*actus agere*.'" But the Lord Chief Justice goes on to add that, "where the sheriff has by his own act illegally arrested the defendant, the defendant is not in custody under the first writ, he is suffering a false imprisonment; and such false imprisonment being no arrest in the original action, cannot operate as an arrest under the other writs lodged with the sheriff."

It is obvious that the same observations will apply where the first arrest is by a mere stranger and wrong-doer; for, in such case, the writs in the sheriff's office

(a) It appeared that, upon this persuasion, the sheriff detained the defendant in *Collins v. Yewens*.

(b) 9 Bing. 570.

cannot operate. But, if in such case a bailiff, having a warrant, arrests the defendant, already illegally in custody, without collusion with those who so have him in custody, such arrest is legal, inasmuch as the defendant is not by such illegal custody privileged from arrest under legal process. And this is the true ground of the decision in *Howson v. Walker (a)* and *Crowden v. Walker (a)*. Therefore, if *Nathan*, who had a warrant at the suit of *Richardson and another*, had arrested the defendant without collusion with *Slowman*, while he was in *Slowman's* illegal custody, doubtless the arrest would have been good, and all other writs then in the sheriff's office would have attached upon it. But the case here is widely different. *Slowman* is the officer in both actions: the present plaintiff, *Collins*, can have no rights except through the agency of *Slowman*, to whom a warrant on his writ was directed after the defendant was arrested. *Slowman* makes no affidavit: we do not know at whose suit he professed to arrest the defendant, whether at the suit of *Collins* or *Richards and another*, or *Richardson and another (b)*. He mentioned no plaintiff's name to the defendant, so far as the affidavits show: and, if we were to hold this arrest or detainer (for it does not appear which it is) good, we should be authorising any sheriff's officer without a warrant to arrest any person against whom he fancied that writs were lodged in the office, and then to cure the illegality of his original arrest by procuring warrants on the writs so lodged; a speculation which cannot be endured. An affidavit is made by the clerk of the plaintiff's attorney, denying any collusion with the sheriff or *Slowman*; but this is

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(a) 2 W. Bl. 823.

(b) In both these cases, there were writs against *Yewens*.

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very vague ; and, besides, the warrant in the action is to *Slowman* himself, the wrong-doer.

In the case of *Richards and another v. Yewens* (a) the warrant was not directed to *Slowman*, but to one *Willis*, a sheriff's officer. There is an affidavit by the clerk of the plaintiff's attorney denying all collusion : and this case depends on the question whether, under the circumstances, the writ, which was in the sheriff's office before the illegal arrest, operated.

We are of opinion that it did not, by reason of the defendant not being at any time legally in custody of the sheriff under any legal arrest. Here, as in the former case, if *Willis* had arrested the defendant whilst in such illegal custody, he could not have been discharged ; but no such arrest was made. We are therefore of opinion that the rules must be made absolute for discharging the defendant in both actions.

Rule absolute (b), without costs.

(a) It is not thought necessary to report this case more fully.

(b) See *Pearson v. Yewens*, 5 New Ca. 489, 567. ; *Hall v. Hawkins*, 4 M. & W. 590. ; *Watson v. Carroll*, 4 M. & W. 592. ; *Robinson v. Yewens*, 5 M. & W. 149.

END OF TRINITY TERM.

C A S E S

ARGUED AND DETERMINED

1839.

IN THE

Court of QUEEN'S BENCH,

AND

WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

Trinity Vacation,

the Second and Third Years of the Reign of
VICTORIA.

Judges who usually sat in Banc in this Vacation

Lord DENMAN C. J.	PATTESON J.
LITTLEDALE J.	WILLIAMS J.

cases, argued and decided in this or former
terms, to which S. is affixed, are reported by Mr.
; those argued in *Trinity* term, 1839, by Mr.
and Mr. *Smirke*; the rest by Mr. *Adolphus* and

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The surrogate of the bishop's official principal is not the proper party to signify the contumacy of a defendant in a suit before him as Judge of the Consistory Court; and this both before and after stat. 53 G. 3. c. 127. : and, where defendant is taken under a contumace capiendū issued upon such certificate, this Court will discharge him out of custody.

CHILTON, in *Easter* term last, obtained a rule to shew cause why the writ of contumace capiendū, issued in this case, should not be set aside for irregularity, with costs, and the defendant be discharged out of custody under the writ, and the prosecutor pay the costs of the application. The grounds of the application were, that the excommunication was certified by a surrogate only, and not by the Vicar General himself, or in the name of the bishop, and that the certificate did not sufficiently set forth the cause of the commitment, or shew the jurisdiction of the Ecclesiastical Court.

There were also affidavits on both sides upon the merits; but they were not discussed, the objection turning wholly on the form of the writ. In last *Trinity* term (a),

E. V. Williams

(a) *Wednesday, May 22d.* Before Lord Denman C. J., *Littledale*, *Patteson*, and *Williams* Js.

The following is a copy of the writ de contumace capiendū, reciting the certificate of the ecclesiastical judge.

Victoria, by the grace of God, &c. to the sheriff of *Carmarthenshire*, greeting. *David Archard Williams*, clerk, surrogate and representative of *Augustus Peckell*, Esquire, Master of Arts, Vicar General and principal official of the Right Reverend Father in God *John Banks*, by divine permission Lord Bishop of *Saint David's*, lawfully constituted and appointed the sole judge of the Ecclesiastical and Consistory Court in *Carmarthen*, in and for the diocese of *Saint David's* aforesaid, hath signified to us that one *David Jones* of *Placenewydd* in the parish of *Llannon* in the county of *Carmarthen* and diocese aforesaid, husbandman, is manifestly contumacious, and contemns the jurisdiction and authority of the law and jurisdiction ecclesiastical, in not obeying the lawful commands of the said *D. A. Williams*, the judge of the said Court, to pay or cause to be paid to the

E. V. Williams shewed cause. Stat. 53 G. 3. c. 127. s. 1. provides that, in causes cognizable in the Ecclesiastical Court, when any person disobeys a lawful decree,

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the Reverend *Ebenexer Morris*, clerk, curate, and incumbent of the parish and parish church of *Llannon* in the county and diocese aforesaid, or to *J. Williams* his proctor, the sum of 35*l.* 11*s.* 4*d.*, the amount of costs on his the said *E. Morris*'s behalf, duly taxed in a certain cause of the office of judge, lately depending before the said *D. A. Williams*, the surrogate and representative of the said *A. Pechell* as aforesaid, in judgment in the said Court held at *Carmarthen*, and still remaining, wherein the said *E. Morris* is the party agent and promovent, of the one part, and the said *D. Jones* is the party respondent accused and complained of, of the other part, in not obeying the lawful commands of the said *D. A. Williams*, the judge of the said Court, as herein is described and set forth, to pay or cause to be paid to the said *E. Morris*, or to his said proctor the said *J. Williams*, the said sum of 35*l.* 11*s.* 4*d.* the costs aforesaid, and to pay to the said *E. Morris*, or to his proctor the said *J. Williams*, the further sum of 3*l.* 2*s.* 8*d.* the taxed costs of a monition and of executing the same monition upon the said *D. Jones*, and by reason of his manifest contempt and contumacy in not appearing before the said *D. A. Williams* the judge of the said Court, lawfully authorised and constituted as herein mentioned, and set forth on a certain competent day, hour, and place, now long past, in the cause or matter aforesaid, which is a cause of the office of judge at the promotion of the said *E. Morris* against the said *D. Jones*, for divers alleged neglects or omissions of several of the ecclesiastical duties of the said *D. Jones* in his office of churchwarden of the said parish of *Llannon*, in the county and diocese aforesaid for the time being, and which said office of churchwarden of the said parish of *Llannon*, in the county and diocese aforesaid, he the said *D. Jones* had duly accepted and taken upon himself for the time being; and particularly for his having as such churchwarden [here the writ set forth his wilful absence from, and refusal to attend at, the parish church of the said parish during the performance of divine worship on several Sundays, to see that due order was kept therein, and his refusal, when required, to provide sufficient sacramental bread and wine, having at the time sufficient or ample means in his hands, or in his power, for that purpose; and also his contempt in not attending before the said judge pursuant to a monition duly issued and served on him, and contumaciously refusing to obey the lawful commands of the said judge and to pay the said costs]. Therefore he the said *D. A. Williams*, lawfully authorised as the judge of the said Court, did in open Court decree and pronounce the said *D. Jones*, for the causes aforesaid, to be contumacious and in contempt, and the said *D. Jones* is therefore contumacious and in

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decree, the judge or judges who issued out the citation, or whose lawful decree is not obeyed, may pronounce such person to be contumacious and in contempt, and, within ten days, signify the same in form annexed to the act, to his Majesty in Chancery, as heretofore done in signifying excommunications; and thereupon a writ de contumace capiendo, in the form annexed, shall issue from the Court of Chancery, and all rules and regulations, not altered by that act, applying to the writ of excommunicato capiendo, are made to extend to the writ de contumace capiendo. The blank form in the schedule (A.) may be relied upon as shewing that the significavit must be by a higher officer than a surrogate. It uses the plural form, "we hereby notify and signify" &c., and the words "by divine Providence." But the latter words apply only to an archbishop; so that any argument drawn from the use of them would exclude a bishop, or the court of delegates. With respect to the plural form, it appears from *Prankard v. Deade* (a)

contempt; and he the said *D. A. Williams*, the sole judge of the Court, as herein mentioned and set forth, being within ten days after his decree being pronounced as aforesaid " [sic] ; " nor will he submit the ecclesiastical jurisdiction; but, forasmuch as the royal power ought to be wanting to enforce such jurisdiction, we command you, that you attend the said *D. Jones* by his body until he shall have made satisfaction for the said contempt; and how you shall execute this our precept notify unto on the 11th January next, wheresoever we shall then be in England, and in no wise omit this: and have you there this writ. Witness ourselves Westminster the 26th November, in the 2d year of our reign. — *Bentall*.

The writ was allowed, inrolled, and delivered of record in this Court Michaelmas term, 2 Vict.

A return of cepi corpus was endorsed by the sheriff in the same term but it had not been filed at the time of making the above motion.

(a) 1 Hagg. Ecc. Rep. 169, 190. See certificates by a commissary, by a mayor of London, in the same plural form, in *Madox's Formulae* pp. 19 and 10.

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that an archdeacon, and even the surrogate of a vicar-general, are in the practice of assuming it; and that a surrogate is, for some purposes, a judge in criminal suits. The form given is only by way of example, and must be fitted to circumstances. It speaks of the "ecclesiastical judge, or his representative." Here the surrogate is the judge whose decree is contemned, and who is therefore the party to signify. There is an obiter observation of the Court in *Rex v. Ricketts* (a), that the judge is to convey the information only as the instrument of the archbishop; but the practice is contrary to this; and the writ in that case was not objected to, though it ran in the name of the official principal. If it be urged that the officer was here the mere deputy of a deputy, the answer is that such deputations are of constant occurrence, and of recognised validity in the spiritual courts. The 128th of the canons of 1603 (b) regulates the appointment of judicial deputies, and prescribes their qualifications. In *Prankard v. Deacle* (c) Sir John Nicholl speaks of the "surrogate, or other competent judge." With respect to the statement of the cause in the court below, enough appears to shew that it was one within its cognizance.

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Chilton, contra. The cause is not sufficiently stated; but at all events the significavit is by the wrong party. The contumacy is to be signified (stat. 53 G.3. c. 127. s. 1.) "as hath been heretofore done in signifying excommunications;" and all rules, applicable to writs of excommu-

(a) 6 A. & E. 537, 541.

(b) *Gibson's Codex*, tit. xliii. cap. 3. (vol. 2. p. 991., 2d ed.).

(c) 1 Hagg. Ecc. Rep. 169, 190.

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nicato capiendo, are extended to the new writs. Now excommunication was always certified by the bishop. In *Co. Lit.* 134. a. it is said that none can certify excommengement but the bishop, or one that has ordinary jurisdiction; and a passage from *Yearb. Pasch.* 11 *Hen.* 4. 64 A. pl. 16. is referred to, in which it is said that formerly every official or commissary of the bishop might testify excommunication, till it was ordained by parliament that none but the bishop should do so. [*Patteson J.* Can you find any such act of parliament (a)?] None. In *Yearb. Tr.* 7 *Ed.* 4. 14 A. pl. 6. it is laid down that the commissary may certify, but it must be in the name of the bishop. The chancellor of *Oxford* or *Cambridge* Universities may certify (b); but the Vice Chancellor cannot, except in the

(a) The words of *Hankford* (then puisne Judge of C. P., afterwards C. J. of K. B.) in the passage in *Yearb. H.* 4. are as follows: "J'ay trove en mes livres en temps Sir Will' Herle, qu'en ascun temps chascun official et commissary d'evesque purra tesmoigner un excommengement en Court le Roy, et per le mischiefe que ensuit d' icel, il fuit avise en parlement, que nul duist tesmoigner excommengement, mes solement d'evesque, et cest ley est uncore use," &c. The name of *Herle*, either as counsel or judge, occurs throughout the reign of *Ed.* 2, and during a part of that of *Ed.* 3, until 1336 (9 *Ed.* 3.), when, according to *Dugdale*, he received his quietus. In all the cases upon certificates of excommunication during that period, which the reporters have been able to find in the year-books and in *Fitzherbert's* abridgement, the bishop or archbishop appears to have certified; nor is there any suggestion in them of a change of practice. *Fleta*, lib. vi. c. 38. s. 2., speaks of the ordinary as the proper person. *Bracton*, lib. v. cap. 23. s. 3., says that an excommunicate may be taken, "ad mandatum episcopi vel ejus officialis," but not on the mandate of a judge delegate, archdeacon, or other inferior judge, "quia rex in episcopos coercionem habet propter baroniam." But he seems to make a distinction between certificates for the purpose of taking the party, and for the purpose of supporting a plea in abatement. See *ib.* sect. 1. And see further *Regist. Brev.* 65.; *F. N. B.* 65.; *Lyndw. Provin.* pp. 127, verb. *Brachium seculare*; 350. verb. *Prælatorum*, ed. 1779.

(b) *Trollop's Case*, 8 *Rep.* 68 b.

name

name of the Chancellor. The rule is, that none can certify but those to whom this Court can write, if necessary; and this Court can only write to the ordinary: *Follop's Case* (a). The bishop alone is the judge meant by the statute. But if the Vicar General be, as he is represented in the writ to be, the "sole judge," then the surrogate, who styles himself only the representative of the judge, cannot be a proper person to signify under the act. A surrogate is one "substituted or appointed in the room of another;" *Cowel's Law Dictionary*, v. *Surrogate*: and the rule "delegatus non potest delegare" applies; for he is only the substitute of a deputy, namely, of a vicar general and official principal. In *Rex v. Ricketts* it was unnecessary to consider whether the writ was objectionable on this ground; but the significavit was there by a judge who united the offices of dean of the arches and official principal, which are always held by the same person. [*Littledale J.* It is said in *Com. Dig. Excommengement*, (B 2.) (b), that the certificate of the contempt ought to be by the ordinary by his letters under seal.] If, then, the significavit is irregular, the capias founded on it must be bad, and the party entitled to his discharge.

Cur. adv. vult.

LORD DENMAN C. J. in this vacation (June 21st) delivered the judgment of the Court. His Lordship stated that, upon referring to the authorities, it appeared that the writ could not properly be issued upon the certificate of a surrogate in his own name. That such certificate was irregular before the statute 53 G. 3.

(a) 8 Rep. 68 a. (b) Referring to *Rex v. Fowler*, 1 Salk. 293.

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c. 127., and that there was nothing in that statute shewing the intention of the legislature to alter the practice in this respect. The defendant was to have his costs, upon undertaking not to bring any action (a).

Rule absolute to discharge defendant out of custody as to his commitment by virtue of the writ de contumace capiendo.

(a) The Court made no order to set aside the writ, as in *Rex v. Hewitt* (note (a) to *Rex v. Ricketts*, 6 A. & E. 547). The defendant elected to take his rule without costs; but no action was ever brought by him. Further proceedings were taken in the Ecclesiastical Court; but they were stopped by the death of the defendant.

Thursday,
June 13th.

CANN against CLIPPERTON.

Where a statutory protection is given to persons having acted in pursuance of the statute, a party is not entitled to the protection merely because he believed, *bonâ fide*, that he was so acting. There must be reasonable ground for the belief.

If the party acted under a reasonable, though mistaken, persuasion, from appearances, that

the facts were such as made his proceeding justifiable by the statute, he is entitled to protection, though the real facts were such that the statute clearly affords no justification.

Thus, if, by the assumed authority of stat. 7 & 8 G. 4. c. 30. s. 28., which gives power to arrest persons found committing certain offences, a party has arrested another as being so found, under circumstances which afforded reason for thinking that he was, at the time committing such offence, though in reality he was not, and an action is brought for the arrest, the defendant is entitled to notice of action under sect. 41.

TRESPASS for assaulting plaintiff, forcing him to go to the Justice-room at the Mansion House in and of the city of London, and falsely imprisoning him &c. Plea, Not Guilty. On the trial before Lord Denman C. J., at the sittings in London after Hilary term 1838, the following facts appeared.

William Wilman was the landlord of a house in *St. Street, Bishopsgate*, of which, at the time in question, one *Horswell* claimed to be tenant, but *Wilman* disputed the tenancy. In November 1837, no one being on the premises, *Wilman* sent in workmen to do repairs. On November 21st (the day before the alleged trespass), *Horswell's* wife, with the plaintiff, who was her brother

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in-law, and others, went to the house, and forcibly took possession. *Wilman*, during the day, endeavoured to repossess himself of the premises, but was driven off. *Mrs. Horswell's* party remained in the house, and, in the latter part of the day, took out the windows, one of which they shattered. *Hall*, a policeman, saw the damage going on, and the plaintiff and *Mrs. Horswell* (as he judged by their gestures) giving directions. *Wilman*, before he was driven away, desired *Hall* to take the parties into custody; but he refused. *Mrs. Horswell's* party remained on the premises during the night. They made a fire on one of the hearths, and suffered the fire to catch the rafters of the house. In the morning, about eight o'clock, *Hall*, the policeman, went into the house and found it on fire. The plaintiff was not there; but the policeman sent to the plaintiff's house in *Holborn* for him. He came about half past ten; and some conversation passed between him and the policeman respecting the fire. The defendant, who was a solicitor, and acted on behalf of *Wilman*, came to the house between ten and eleven; the policeman was then walking up and down the street; the plaintiff was still on the premises, and other persons going in and out. No mischief was being done at that time. The defendant asked the policeman why he did not take the plaintiff into custody, and directed him to do so. The policeman apprehended the plaintiff, and the parties went to the Mansion House, where a charge was preferred against the plaintiff under stat. 7 & 8 G. 4. c. 30., "for consolidating and amending the Laws in *England* relative to malicious Injuries to Property." The charge was dismissed. On proof of these facts, the defendant's counsel urged that the plaintiff must be nonsuited; that the defendant had clearly proceeded on stat. 7 &

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8 G. 4. c. 30. s. 28., which enacts, "that any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law:" and that no notice of action had been given in this case, whereas sect. 41 of the same act provides, "for the protection of persons acting in the execution of this act," that in "all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act," "notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action." The Lord Chief Justice refused to nonsuit, but reserved leave to move that a nonsuit might be entered: and he left it to the jury to say whether the defendant had acted *bonâ fide*, and under a belief that his proceeding was warranted by the statute; whether he, at the time of giving the plaintiff into custody, acted as *Wilman's* servant; and whether, at that time, the plaintiff was "found committing" an offence against the statute. The jury found that the defendant acted *bonâ fide*, and as servant to *Wilman*; but that the plaintiff was not, at the time in question, found committing an offence against the statute. Verdict for the plaintiff with one shilling damages. *Kelly*, in *Easter* term, 1838, obtained a rule nisi for entering a nonsuit, or verdict for the defendant. He cited *Beachey v. Sides* (a) and *Ballinger v. Ferris* (b).

(a) 9 B. & C. 806. (b) 1 M. & W. 628. S. C. Tyr. & G. 930.

Platt and *Fish* now shewed cause. It was decided by the jury, and is clear from the evidence, that the plaintiff, when taken into custody, was not found committing any offence against the act. The being so found is essential to the right of apprehending summarily under stat. 7 & 8 G. 4. c. 30. s. 28., which differs in this respect from the statute 1 G. 4. c. 56. s. 3. against wilful trespassers, where such right was given in the case of any person who should "have actually committed, or be in the act of committing, any offence" there specified. It is said that the defendant is nevertheless protected, because he thought he was acting under the statute in causing the plaintiff to be arrested. But the belief, to furnish such a defence, must be a reasonable belief; here it was quite unfounded. The defendant was an attorney, and might be expected to know the law. In *Beechey v. Sides* (a) there was a clear case of trespass by the party arrested; the circumstances were such as might lead a man of ordinary discretion to think that he was acting under the statute; bona fides was the only question. *Bayley* J. said, "Where the facts are such that a party may be considered as having any fair colour for supposing that he is warranted by the act of parliament in doing that which is made the subject of an action, he is entitled to notice." Here no such colour appeared. In *Ballinger v. Ferris* (b) the defendant's character of a public officer was taken into consideration; the party apprehended had, in fact, committed a forcible injury just before the arrest; and it was made for that. Lord *Abinger* C. B. there observed that the provisions of stat. 7 & 8 G. 4. c. 30. s. 41., as to notice, would be useless

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(a) 9 B. & C. 806.

(b) 1 M. & W. 628. S. C. Tyr. & G. 920.

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if they did not extend to cases where the party claiming notice might be unable to justify the conduct complained of; that remark applies where the proceeding has been a mere slip, but not where it is so manifestly without reason as in this case. *Bayley J.*, in *Cook v. Leonard* (a), states the general rule thus. "Where an act of parliament requires notice before action brought in respect of any thing done in pursuance or in execution of its provisions, those latter words are not confined to acts done strictly in pursuance of the act of parliament, but extend to all acts done *bonâ fide* which may reasonably be supposed to be done in pursuance of the act. But where there is no colour for supposing that the act done is authorised, then notice of action is not necessary." This case falls within the latter part of the rule. It is, indeed, found that the defendant acted *bonâ fide*; but, as was pointed out by *Patteson* and *Coleridge Js.* in *Wedge v. Berkeley* (b), *bona fides* and reasonable cause are two distinct questions in such a case: the finding of *bona fides* negatives any imputation of malice; but the party is not protected if he acted without reasonable cause.

Kelly, contra. The defendant's mistake has consisted in overlooking the distinction, noticed on the other side, between stat. 7 & 8 G. 4. c. 30. s. 28. and stat. 1 G. 4. c. 56. s. 3. On the 21st November it would clearly have been lawful for him, as *Wilman's* servant, to apprehend the plaintiff while the windows were being pulled out and destroyed under his direction. On the following day, when the defendant arrived, no damage

(a) 6 B. & C. 351. See p. 354.

(b) 6 A. & E. 663.

was actually being committed; but there was recent mischief, and the plaintiff was on the premises. Then the defendant, as servant to *Wilman*, and acting bonâ fide (both which facts are found by the jury), gave the plaintiff into custody. Such a case is within the protection of stat. 7 & 8 G. 4. c. 30. s. 41. It is laid down as the law, in *Beechey v. Sides* (a), that, where a defendant has really believed himself justified by statute in doing the act complained of, this section applies. In *Cook v. Leonard* (b) it was evidently the opinion of the Court, and of *Bayley J.* in particular, that the defendant could not bonâ fide have believed himself acting under legal authority. That case was relied upon in *Wright v. Wales* (c); and there the question considered by all the Judges was, in effect, whether it fairly resulted from the facts that the defendant considered himself justified. In *Cook v. Leonard* (b) *Bayley J.* held (p. 355, 6.) that notice is unnecessary only "where there was no colour for supposing the act to be authorised, and that a party is protected if he had reasonable grounds for thinking that a statute gave him the authority which he has used." That the belief was simply erroneous is no ground for denying the protection; if it were, sect. 41 would be useless. It was said by Lord *Abinger C. B.* in *Ballinger v. Ferris* (d), "We should take away the protection given by the statute, if we were to say that where there is a doubt as to the authority of the party, but none as to his motives, he should not have the opportunity which the legislature designed to give him, of tendering amends. The very purpose for which the act gives him that

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(a) 9 B. & C. 806.

(b) 6 B. & C. 351

(c) 5 Bing. 336.

(d) 1 M. & W. 628. S. C. Tyr. & G. 920.

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opportunity supposes him unable to justify the facts; he requires notice that he may tender amends." So *Park J.* said, in *Wright v. Wales (a)*, "If he" (the defendant) "had been acting legally, he would not have wanted the protection afforded by the notice." (*Crowder*, on the same side, was stopped by the Court.)

LORD DENMAN C. J. The case of justification was a little short on the facts. *Wilman* had been at the house on the 21st of *November*, and seen the plaintiff there, under circumstances which seemed to shew that he was encouraging the mischief then proceeding. A fire takes place during the night: on the following morning the defendant comes to the premises: he sees the same course of mischief apparently going on, a recent conflagration, and the plaintiff on the premises. Then he says to the police officer, "Why do not you take him into custody?" The defendant seems not merely to have had that impression which was suggested, as to the law, but to have thought that the mischief was actually going on at the time. Else I am unwilling to say that, if a party acts *bonâ fide* as in execution of a statute, he is justified at all events, merely because he thinks he is doing what the statute authorises, if he has not some ground in reason to connect his own act with the statutory provision. The doctrine attributed to *Bayley J.* goes too far. But here the defendant might reasonably think that, in point of fact, the circumstances were those to which the protection of stat. 7 & 8 *G. 4. c. 30. s. 41.* attaches. The rule for a nonsuit must therefore be absolute.

¹(a) 5 *Bing.* 336.

LITTLEDALE J. I am of the same opinion. Mere bona fides is not sufficient; for a man may be very foolish in believing himself justified. But here the defendant had reason to think that the mischief was going on when he ordered the plaintiff to be apprehended; therefore notice ought to have been given.

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PATTESON J. Perhaps none of the cases differ in principle from the decision we are now coming to: but single expressions are sometimes laid hold of, and too much insisted upon. It is not because a man chooses to think himself acting under a statute, that he can, by such mere fancy of his own, protect himself in an action. But here the defendant had some ground for thinking that he was really in the situation which justified his proceeding.

WILLIAMS J. I am of the same opinion. It would be wild work if a party might give himself protection by merely saying that he believed himself acting in pursuance of a statute; for no one can say what may possibly come into an individual's mind on such a subject. Still, protecting clauses, like that before us, would be useless if it were necessary that the person claiming their benefit should have acted quite rightly. The case to which they refer must lie between a mere foolish imagination and a perfect observance of the statute. Here the defendant might with some reason believe that the facts were such as would entitle him to protection.

Rule absolute for entering a nonsuit (a).

(a) See *Wells v. Ody*, 2 C. M. & R. 128.; S. C. 5 Tyr. 725.; *Hopkins v. Crowe*, 4 A. & E. 774.; *Reed v. Cowmeadow*, 6 A. & E. 661.; *Tidds v. Dawson* 9 A. & E. 654

1839.

Friday,
June 14th.

FLIGHT and Another *against* THOMAS.

Case for annoying plaintiff in the enjoyment of his house, by causing offensive smells to arise near to, in, and about it. Plea, enjoyment as of right for twenty years of a mixen on defendants' land contiguous and near to plaintiff's house, whereby, during all that time, offensive smells necessarily and unavoidably arose from the said mixen.

On a traverse of the right, the defendant had a verdict. Held, that the plea was bad, and plaintiff entitled to judgment non obstante, for that it did not shew a right to cause offensive smells in the plaintiff's premises, nor that any smells had, in fact, been used to pass beyond the limits of defendant's own land.

CASE. The declaration stated that plaintiffs, before and at the time &c., were lawfully possessed, and in the actual occupation of, a certain dwelling house &c., and that defendant was possessed and in the occupation of a certain other dwelling house and premises, and of a piece of ground, with the appurtenances, situate near to, and adjoining, the premises of the plaintiffs, yet defendant, well knowing the premises, but intending to injure plaintiffs and to incommode and annoy them in the enjoyment of their dwelling house, on &c., and on divers other days and times &c., "wrongfully and injuriously caused divers offensive and pestilential stenchs and smells to arise, come, and be near to, in and about the said messuage or dwelling house of the plaintiffs, and thereby, during all the time aforesaid, the said premises of the plaintiffs were rendered and became uncomfortable, unhealthy, unwholesome, and unfit for habitation." Pleas. 1. Not guilty. 2. That before and at the time of the committing of the said grievances, defendant was possessed and in the occupation of said dwelling house and premises and piece of ground with the appurtenances in the declaration mentioned, situate near to and adjoining the said premises of plaintiffs; and that defendant and his predecessors, occupiers for the time being of the said house and premises and piece of ground, for the full period of twenty years next before the commencement of this suit, had enjoyed, as of right and without interruption, the benefit and advantage of having and using a certain

a certain mixen in and upon the said premises, contiguous and near to the said premises of plaintiffs, for the more convenient occupation and enjoyment of said premises of defendant; and thereby during all that time divers stenchs and smells necessarily and unavoidably arose from the said mixen; and that defendant, being so possessed &c. and having occasion to use the said mixen at the said several times when &c., did use the said mixen for the more convenient occupation and enjoyment of his said premises, as he lawfully might &c., and by reason of such user the said stenchs and smells necessarily and unavoidably arose from the said mixen: which are the same grievances &c. Verification.

Replication, traversing the enjoyment of the mixen as of right for the period in the second plea mentioned, in manner and form &c.

The cause was tried at the *Dorsetshire* Spring assizes, 1838, when the jury found that the mixen was a nuisance, but that the plaintiff had come to it: they also found the second plea for the defendant, whereupon a verdict was entered for him on the second issue.

Manning, in the following term, obtained a rule to shew cause why judgment should not be entered for the plaintiffs *non obstante veredicto* on the ground that this was not an easement properly so called, not being a right in alieno solo; and he cited *Hewlins v. Shipham* (a), and *Popham v. Woolcott* (b): he also contended that it was, at all events, not an easement within 2 & 3 W. 4. c. 71.

Barstow now shewed cause. It is objected than an easement must be on the land of another. Easements

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(a) 5 B. & C. 221.

(b) 1 Sid. 291.

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are defined to be "rights of accommodation on another's land, as distinguished from those which are directly profitable;" *Burton on Real Property*, ch. vi. sect. 3. art. 1165. Here the easement is the right to do that which occasions inconvenience to another. The smell is in alieno solo, and the definition of an easement does not require that the right exercised over the neighbour's land should be of a corporeal or substantial nature. The statute of 2 & 3 W. 4. c. 71. applies to those cases in which a grant might have been pleaded at common law; now there is no reason why the plaintiffs might not have granted to the defendant a right to corrupt the air over their premises, just as they might authorise the establishing of any other nuisance. [*Coleridge J.* You do not allege a right to make the smell on the plaintiffs' premises, but only to keep a mixen, whereby smells arose.] One right is a necessary consequence of the other, and results from it as of course. Perhaps it might have been stated more distinctly, but the statement is good on general demurrer, and, à fortiori, after verdict, when every reasonable intendment will be made in favour of the plea.

Lord DENMAN C. J. There is no claim of an easement, unless you make it appear that the offensive smells had been used for twenty years to go over to the plaintiffs' land. The plea may be completely proved without establishing that right. The nuisance may never have passed beyond the limits of the defendant's own land.

LITTLEDALE J. The plea only shews that the defendant has enjoyed as of right, and without interruption
for

for twenty years, the benefit of something that occasioned a smell in his own land.

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PATTESON and COLERIDGE Js. concurred.

S. Rule absolute for judgment non obstante veredicto.

SHEARM against BURNARD.

Friday,
June 14th.

ASSUMPSIT by indorsee against maker of a promissory note for payment of 100*l.* payable to one *Jose*, who indorsed to plaintiff.

Assumpsit on a promissory note by indorsee against maker. Plea, that it was delivered by defendant to the indorser *J.* to enable him to take up a former note, also made payable by defendant to *J.*, for the accommodation of *J.*, and by him indorsed to plaintiff; and that, after the note declared on became due, the amount was paid to plaintiff by defendant. Replication, de injuriâ generally.

Plea, that, before the making of the note, defendant, at the request and for the accommodation of *Jose*, made another promissory note for 100*l.*, payable to the order of *Jose*, who indorsed it to plaintiff; and that there was no consideration for making the last-mentioned note. That the last-mentioned note afterwards, and before the making of the note mentioned in the declaration, became due; whereupon defendant made the said second note, and delivered it to *Jose*, in order to enable him to take up the first note; and that there never was any other consideration for making the second note. That defendant, after the second note (namely, the note mentioned in the declaration) became due, towit on &c., and on divers other days and times &c. before the commencement of the action, paid to plaintiff divers monies, towit, 110*l.*, in satisfaction thereof, and of all damages

Held, that the averment, introductory to the payment of the last mentioned note, might be rejected as surplusage; that the payment only need be proved; and that such payment might be shewn without producing the note itself.

Held also, that, in an action by plaintiff on the first note, a verdict and judgment for defendant on the above issue would not be pleadable in bar, nor evidence of any immaterial statements in the plea; for that the replication only put in issue material allegations.

1839. &c. Acceptance of such payment by plaintiff in satisfaction. Verification. Replication, de injuriâ.

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At the trial at the Spring assizes at *Launceston*, 1838, the defendant proved payment by *Jose* of the sum mentioned in the plea in satisfaction of a note, which was stated by the witness to be the note mentioned in the declaration; but neither that, nor the former note, was produced by the defendant; nor was it proved that the second was given in lieu of the first. The note was not given up on payment; and no notice had been given by defendant to produce it. It was contended for the plaintiff that the introductory part of the plea ought to have been proved and the notes produced. *Erle*, for the defendant, applied for an amendment by striking out the first part of the plea; which the judge refused. The jury, by the direction of the judge, found for the plaintiff on the ground that the plea had not been proved. In the following term *Erle* obtained a rule nisi for a new trial.

Bompas Serjt. and *Butt* now shewed cause. The defendant ought either to have produced the note, which he is alleged to have paid, or have given notice to the plaintiff to produce it. He cannot identify the note paid without describing its contents; nor be permitted to describe its contents without producing it. He proved only payment of a note, not of the note. If it be said that the issue admits the note declared upon, the first note, at all events, is not admitted; for it is mentioned for the first time in the plea, and denied by the replication. The defendant is bound to prove the whole plea, though the statement, introductory to the payment of it, might have been omitted. If it is found for the defendant, the judgment will be conclusive against the plaintiff upon an action on the first note,
either

either as a plea or as evidence, because it will establish satisfaction, not only of the second, but also of the first note. The defendant ought, therefore, to produce the first note, and shew the second given in lieu of it. That the plea would have been good without some of its averments, is no ground for relieving him from proof of them; for there are many cases in which parties are bound by needless statements in the pleadings; as where a seisin in fee is alleged, when possession alone would have been enough.

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Erle contra. The test of the necessity of proof is the materiality of the averment. Here all the allegations might be struck out, except that of payment of the note declared upon. They are mere surplusage. The substance is payment; the rest is a preliminary statement of the motive which induced the defendant to give the note. If a verdict and judgment for defendant in this action were pleaded in bar to an action on the first note, the plea would be demurrable; if given in evidence under some other plea, the Court would take notice that the introductory matter is not, in effect, traversed by the replication, and therefore need not have been proved.

Lord DENMAN C. J. If we see enough in the plea to constitute a defence independently of superfluous allegations, we may reject them and treat them as if they had not been there. Where material facts are stated to have happened in a particular way, there the whole must be proved as laid; but here the plea professes to state motives by way of introduction to the fact of payment. Such statements need not be proved. The plea is satisfied by proof of payment and acceptance in discharge of the note mentioned in the declaration.

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LITTTLEDALE J. As to the effect of a verdict in barring an action on the first note, the plea, even if the whole be taken as proved, does not distinctly shew any satisfaction of it. If it had appeared that *Jose* had paid or discharged it, then such payment, being by one in privity with the defendant and not a mere stranger, would have been a bar. But here the whole statement with regard to the first note must be rejected from the plea.

PATTESON J. It is clear that the first part of the plea was not proved; for it was necessary to produce the note mentioned in that part, in order to prove its existence. But it is otherwise of the second note, which is admitted on the pleadings, and therefore need not be produced. I agree with Mr. *Erle*, that, if the judgment for the defendant in this action should be pleaded in bar of an action by the plaintiff on the first note, it would be demurrable; for the replication *de injuria* only puts in issue material statements. Needless allegations may be rejected, as in *Tanner v. Bean (a)*, where, in an action by indorsee against indorser, it was held that a needless averment of acceptance required no proof.

COLERIDGE J. The distinction is between an averment, the whole of which can be got rid of without injury to the plea, and an averment of circumstances essential to the defence, which are stated with needless particularity. In the latter case the whole averment must be proved as pleaded. In the former case, in civil or criminal pleadings, the whole may be considered as struck out, and therefore need not be proved. It is as if the plaintiff, declaring on a warranty, had also alleged a scienter; *Williamson v. Allison (b)*. The

(a) 4 B. & C. 312.

(b) 2 East, 446.

plea,

plea, if found for the defendant, will not, in a future action, be evidence of any thing which it was unnecessary for the defendant to prove in this action.

S. Rule absolute for a new trial (a).

(a) The following case (see 5 N. & M. 433.) was referred to in the argument.

READ *against* GAMBLE.

ASSUMPSIT on a cheque for 21*l.* made by defendant, payable to plaintiff or bearer, on money lent, and on an account stated. Plea, that the cheque was made and delivered for 21*l.* lost by defendant to plaintiff; and won by plaintiff of defendant by playing with dice at an unlawful game called hazard, at one sitting, contrary to the statute &c., and not for other consideration. Verification. The same plea as to the account stated; and Non assumpsit as to the money lent. The replication joined issue as to the money lent, and took issue as to the cheque being given, and the account stated, for the money lost, &c. On the trial before *Williams J.*, at the sittings at *Westminster*, after *Trinity* term, 1835, the plaintiff's counsel did not produce the cheque. The defendant's counsel contended that the plaintiff was bound to do so as part of his case; but the learned Judge was of a contrary opinion. The defendant's counsel then called for the cheque as part of his own case; but the plaintiff's counsel refused to produce it. No notice to produce had been given. The learned Judge ruled that the plaintiff was not bound to produce it. Verdict for plaintiff, with leave to move for a nonsuit.

But now moved for a nonsuit, or for a new trial; and contended, first, that the production of the cheque was a necessary part of the plaintiff's case; and, secondly, that the defendant was at all events entitled to call for it, though he had given no notice. [Lord *Denman C. J.* You were not prevented from proving it on your part.] The defendant was entitled to have it produced by the other party. In trover for a written instrument, the plaintiff is not bound to give notice to the defendant to produce the instrument, because the declaration is sufficient notice. So, here, the action being expressly upon the cheque, the defendant is entitled to consider that the plaintiff undertakes to produce it.

LORD DENMAN C. J. In trover notice is not necessary to entitle the party to produce secondary evidence. Here the defendant admitted by his plea that he gave the cheque; and therefore the plaintiff was not bound to produce it as part of his own case. Neither was he bound to produce it for the purpose of aiding the case of the defendant.

PATTERSON, WILLIAMS, and COLERIDGE Js. concurred.

Rule refused.

See *Scott v. Jones*, 4 Taunt. 865.; *How v. Hall*, 14 East, 274.; *Bucher v. Jarratt*, 3 B. & P. 143.

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Tuesday,
November 3d,
1835.

To a declaration in assumpsit on a cheque, defendant pleaded that it was given for money won at an unlawful game at dice. Issue thereon. The defendant did not give notice to produce the cheque. Held, that, on this issue, the plaintiff was not bound to produce the cheque, either as part of his own case, or, when called upon to do so at the trial, as part of the defendant's evidence.

1839.

Saturday,
June 15th.

STURGE *against* BUCHANAN.

Plaintiff gave defendant notice to produce certain specified letters written by defendant to his partner, and a letter-book kept by him, containing copies of the above letters; and defendant consented to admit copies of the letters, saving just exceptions, &c., and undertook to produce the letter-book in proof of them.

Held, first, that the book, when produced by defendant, was good secondary evidence against him of the letters specified in the notice; secondly, that, supposing proof of the sending of the letters to be material, the fact of their being transcribed in such a book was evidence of it

as against defendant; thirdly, that defendant had no right to read, in his own behalf, other letters upon the same subject, copied in the same book, but not referred to in those read by the plaintiff.

Held also, that, although the above letters were written to a partner resident in *New South Wales*, yet, as there had been proceedings in Chancery between the same parties on the subject of the action six years before the trial, in the course of which the letters had been referred to, the Court would presume that they had been remitted to *England*, and that three days' notice to produce them was therefore sufficient.

Held also, that, the object of the evidence being to prove admissions by defendant, the transcripts in the book, made by defendant or by his authority, were alone sufficient for that purpose, without proving, or giving notice to produce, the originals.

by

ASSUMPSIT for goods sold, and on money counts. Pleas, Non assumpsit, and a Set-off. Upon the trial of the cause before Lord *Denman* C. J. at the sittings in *London* after *Hilary* term 1838, it appeared that the action was brought to recover the value of a cargo of oil belonging to the plaintiff, and sold by the defendant to satisfy certain advances made by defendant's partner, *Lamb*, residing in *New South Wales*, to the captain of the vessel, for the alleged purpose of repairing and refitting it on its homeward voyage. Some of the disbursements, which the advances were intended to meet, did not come within the description of necessary repairs or expenses; but it was contended by the defendant that the plaintiff had ratified and adopted them by his subsequent conduct and dealings with the defendant. For the purpose of shewing that defendant's partner had made the advances improperly, and that his acts had not, in fact, been recognised by the plaintiff, the plaintiff offered evidence of admissions contained in certain letters written by defendant to his partner in *New South Wales*, in 1831, of which plaintiff had obtained a knowledge by means of a bill in equity filed

y him against defendant and his partner, in *December 1831*, on the subject of this suit. The present action was commenced in 1832. Before the trial, defendant was required, in the usual form, to admit, among other documents, certain "duplicates, copies, and extracts" described in the schedule of the notice as an "Extract from a Letter book kept by the defendant, No. 304, date 25th *July* 1831; Ditto, No. 313, date 1st *September* 1831; Ditto, No. 374, date 10th *December* 1831," &c.; and that such duplicates, copies, or extracts, were true duplicates, copies, or extracts, and that the originals were respectively written, signed, dated, sent, delivered, and received as stated in the schedule, saving all just exceptions to the admissibility of the several documents as evidence, &c.

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An order to admit was thereupon made by consent on 14th *February* 1838; and the documents referred to were signed by the judge and attorneys for the purpose of identifying them. The defendant's attorney also undertook to produce at the trial the "Letter-book" referred to in the notice.

On the 16th *February*, four days before the trial, defendant was duly served with notice to produce certain specified letters written by him to his said partner, numbered and dated as in the above notice to admit; and also "the letter-book kept by the said defendant, containing the drafts, duplicates, or copies of the several letters above specified," &c., "and which letter-book you, the said" (defendant's attorney), "have given an undertaking in this cause to produce on the trial hereof."

At the trial, the notice to produce the letters was objected to as too short, inasmuch as they must be presumed

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sumed to be in *New South Wales*. The Lord Chief Justice over-ruled the objection, and admitted the letter book (from which the extracts, referred to in the notice to admit, had been copied), as secondary evidence of the letters themselves. The book, which was indorsed "*Lamb, Buchanan, and Co.*," purported to be copies of, or extracts from, the correspondence between the defendant and his partner *Lamb*. Three of these letters, purporting to be copies of letters written by the defendant *Lamb*, were read on the part of the plaintiff. The defendant then claimed a right to read to the jury several others contained in the same book; but his Lordship refused to permit any to be read on behalf of the defendant, except two which were expressly referred to in the letters read by the plaintiff. The jury found a verdict for the plaintiff.

In the following *Easter* term, Sir *W. W. Follett* obtained a rule nisi for a new trial on the points taken at *Nisi Prius*, and also for misdirection. The latter ground of motion is here omitted.

Sir *J. Campbell*, Attorney General, Sir *F. Pollock*, *R. V. Richards*, and *Swann* now shewed cause (a). The notice to produce was sufficient under the circumstances. But, at all events, the entries made by the defendant's direction in a book kept by him are evidence as against him. The original letters might have been produced by the defendant; and, in their absence, the copies and extracts in the book are admitted to be true copies and extracts. The defendant objected to the admissibility

(a) Before Lord Denman C. J., *Littledale*, *Patterson*, and *Williams Jr.*

opies signed by the judge, because he was will-
 roduce the book itself from which they were
 l; and, when produced, he insisted on reading
 s of all other letters transcribed in it. But the
 of one letter in it does not make another un-
 d one evidence. It makes no difference that
 rs happen to be bound together in a book.
 ad happened to be upon the same file, it could
 : been contended that all were made evidence;
 case is not, in principle, different. Similar at-
 ave been made to put in evidence bundles of
 ngs in bankruptcy, or all the entries in corpo-
 ooks, merely because one paper or entry has
 d by the opposite party; but they have always
 ected by the Court. *Catt v. Howard (a)* is ex-
 point. There the defendant was not allowed to
 tinct entries in his own day-book, though the
 had read one of them against him. The same
 as been ruled in the case of parol evidence of
 is made in the course of the same conversation;
 r. *Samo (b)*.

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and *Wightman* contra. The plaintiff unfairly
 , avail himself of his knowledge of letters, ob-
 rom the defendant's answer in Chancery, without
 the answer itself, the originals being in *New*
Vales in the possession of the party to whom
 re addressed. There was nothing from which
 ndant could infer that the production would be
 l at the trial; and the notice itself allowed no
 procure them. Secondary evidence was there-

(a) 3 *Star. N. P. C.* 5.(b) 7 *A. & E.* 627.

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fore inadmissible. But, supposing the notice to be sufficient, neither the admissions, nor the book, were evidence that any such letters had been sent. The defendant is only ordered to admit that certain extracts are true extracts from a certain book called a "letter-book," kept by the defendant. He does not admit that the letter-book contains true copies of the original letters, nor that such letters were ever sent, or even written. All just exceptions to the admissibility of the book itself, or the extracts from it, are saved. If, therefore, the letters were relied upon as such, then the book was not evidence of them. But, if the book was put in evidence, not as containing copies of letters, but as a document containing a statement of the transactions made by the defendant himself, or his clerks with his privity, then every part of it relating to that transaction ought to have been read, if required. If the book had been headed, "Detail of circumstances relating to transactions between *Sturge and Buchanan and Co.*" no doubt the whole would have been made evidence, if the plaintiff chose to read a part. Yet the book was, in fact, only a narrative made up of a series of extracts and copies of letters. If the plaintiff had read a partial extract from one letter, the whole might have been read by the defendant. So where he reads one of a series of extracts from correspondence, the whole series ought to be laid before the jury, if it tends to explain, qualify, or illustrate the parts selected by the plaintiff. The fallacy lies in treating the document as separate letters, and not as one entire book. *Catt v. Howard* (a) was a *Nisi Prius* decision against the party who ultimately suc-

(a) 3 Stark. N. P. C. 5.

ceeded,

ceeded, and, of course, was very little discussed. It is not clear, too, what was the subject of the entries there referred to, or the degree of connexion between them. The term "unconnected" used in the report is very general. As to *Prince v. Samo* (a), there is a distinction between evidence of a conversation, which is a term of vague import and undefined extent, and proof of a single document. Where a book is produced, the evidence is confined within the compass of it, and no question can arise as to what is, or is not, a part of the same document.

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Cwr. adv. vult.

Lord DENMAN C. J., on a subsequent day in this vacation (22nd *June*), delivered the judgment of the Court.

As to the evidence, the plaintiff had had the advantage of seeing some letters written and sent by the defendant to his partner, exclusively, I presume, by means of a suit in Chancery. He gives him notice to produce three of them, which he particularly describes. He then summons him before a judge to admit copies of those three letters: the judge orders accordingly, by consent and subject to all just exceptions; and the copies are signed by the judge and the attorneys; the defendant at the same time agrees to produce his letter-book at the trial. The notice is proved; the signed copies produced; which are objected to, because the defendant had agreed to produce the book; the book is then called for and produced: plaintiff proposes to read the three letters.

This proceeding gives rise to several objections.

First, that the notice is insufficient, the letters having

(a) 7 A. & E. 627.

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been sent to the partner in *New South Wales* ; and therefore no secondary evidence receivable.

The sufficiency of the notice in all cases depends on circumstances. If the letters are in *New South Wales*, this notice is nothing. But there is no proof of this, nor any presumption. This action was brought in 1832; proceedings had since been commenced in Chancery (a), and were greatly prolonged : all documents were probably sent over and produced, and would remain in *England*, where they were likely to be wanted. The notice then was good ; secondary evidence was admissible ; and the plaintiff was free to call for the letter book as a means of proving the contents of those particular letters.

Secondly, even if he was not, defendant had expressly undertaken to produce that letter-book for proof of those letters. He does so ; but contends that they are not to be read without proof that they actually were sent.

The answer is, first, that the description of them as *sent* is perfectly immaterial, the writing of them by defendant being the only fact required to make them evidence. Secondly, the letter-book, when produced in pursuance of the undertaking, clearly shews that they were sent. The very fact of their being transcribed into such a book proves this as against the party keeping it. Defendant now says, "as you prove the letters by my book, I have a right to read in evidence the whole of that book ; or at least the whole correspondence on the subject, as it is found in the same book. You produce a document of my writing, and must read the whole."

(a) The bill in Chancery was filed in 1831 before the commencement of the action. The marginal abstract pursues the statement of facts as recited in the judgment.

But

But how can this be called a document? It is a series of copies of letters written from time to time, on principle exactly the same thing as if they had been kept in his counting-house on a file. It is like proving what a party said in one conversation: one of these letters, or one of these conversations, may be proved without authorizing the opposite party to bring forward, for his own benefit, what he himself said or wrote in another conversation, or a different letter. The late decision in *Prince v. Samo* (a) carries this principle much further. That the rest of the correspondence may throw light upon these parts of it, is true; but the light may be a false one. Plaintiff is not bound to know whether it would or not; nor whether any other statements were made as they appear in the book, or, if made, were true.

It was surmised that an unfair advantage had been taken of the defendant in obtaining a knowledge of these letters through a suit in chancery, and then producing them without the answer, which may have greatly qualified and altered their effect. But I cannot think that a judge at nisi prius has any thing to do with these considerations: he is to enquire only whether due notice has been given; whether the documents have been proved to exist; whether copies are well proved. Or taking this to be a piece of original evidence, as written by defendant or by his authority) he is to prove the handwriting, or the authorization. He does this by the undertaking to produce the book in proof of the three letters described, and of the three letters only; the mode of proving them can give the other side no new

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rights. [His lordship then proceeded to give judgment on the merits of the case, and on the alleged misdirection.]

S.

Rule discharged.

Saturday,
 June 15th.

LUNNISS *against* Row.

The objection of incompetency on the ground of interest, arising on the examination of a witness, may be removed by the parol evidence of the same witness that he has been released; though his interest appears on the face of the plea which he is called to prove.

Therefore where, in an action against the acceptor of a bill, defendant pleaded that it was accepted for the accommodation of the drawer, who indorsed it to plaintiff without consideration: Held, that the drawer, who was called by defendant to prove the plea, and who gave parol evidence of a release by defendant, was competent, without producing or formally proving the release.

Quære, whether, in such case, a release be necessary since 3 & 4 W. 4. c. 42. s. 26. ?

ASSUMPSIT by indorsee of a bill of exchange drawn by *J. Smith* on, and accepted by, defendant.

Plea. That defendant accepted the bill for the accommodation and use of the said *J. Smith*, and solely for the purpose and in order that he might raise money thereon by getting the same discounted, and that there was not, at any time, any consideration or value for defendant's acceptance thereof. That *J. Smith* indorsed and delivered the bill to plaintiff before it became due, and plaintiff then received and held the same for a special purpose, to wit, for the purpose and in order that plaintiff might get it discounted for *J. Smith*, and pay the proceeds thereof to him for his use and benefit. That plaintiff, in violation of good faith, and without the consent of *J. Smith*, held and detained the same under pretence that he would destroy it, and had fraudulently put it in suit without having given any value for it. Verification. Replication, *de injuriâ*.

At the trial before Lord Denman C. J., at the *London* sittings after *Hilary* term, 1838, *Smith*, the drawer, being called as a witness for the defendant to prove the

matters

matters alleged in the plea, was objected to as incompetent. On examination, he stated that he had been released by the defendant, and gave parol evidence of the contents of the release; but the release itself was not produced. It was contended, for the defendant, that no release was necessary since stat. 3 & 4 W. 4. c. 42. s. 26.; and that, if it was, sufficient proof of it had been given. His Lordship directed the witness's name to be indorsed on the record, and received the evidence, reserving leave to move to enter a verdict for the plaintiff. The jury found for the defendant. In *Easter* term, *R. V. Richards* obtained a rule nisi accordingly.

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Butt now shewed cause. The incompetency of the witness only arises from the fact of his being an accommodation drawer. This is admitted by him; but he also states that he has been released. [Lord *Denman* C. J. The objection is, that the proof of his incompetency was not obtained from himself on the voir dire, but from your own admission. At the trial he was produced on your part as the person mentioned as drawer in the declaration, and alleged in your plea to be an accommodation drawer.] In effect, it is the same as if he had stated an interest on the voir dire. He was called to prove that he was the person named in the plea, and was an accommodation acceptor: this would have disqualified him, but for the release. The general rule applies, that where his own admission disqualifies him, the same testimony will be sufficient to prove the removal of the disqualifying interest. *Goodhay v. Hendry* (a) is the

(a) *M. & M.* 319.

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only case that appears to contradict the rule. There the bankrupt was held incompetent for his assignees, in an action to recover a debt due to the estate, without regular proof of the certificate. That case, however, whether distinguishable or not from the present, has not been followed, as appears in the note of the reporter, and in *Carlisle v. Eady* (a). *Quarterman v. Cox* (b) only shews that, if the release is actually produced, the opposite party has a right to inspect and read it. [On the point, as to the effect of the statute in making the witness competent without a release, the argument is omitted.]

R. V. Richards and *Whitehurst*, contra. The rule is, that where the objection is elicited from the witness alone, it may be repelled by the same species of evidence, namely, by parol evidence. But here, as soon as the identity of the witness with the party named in the plea appears, his incompetency stands confessed by the defendant, and must be repelled by legitimate evidence. Nor is there any hardship in this; for the defendant is necessarily apprised of the objection, and might have provided himself with proof of the release. [*Patteson* J. Would you require proof by attesting witnesses?] An attesting witness is needless to a release; but if there be one, he must be called. *Goodhay v. Hendry* (c) is in point, and is confirmed by the opinion of *Tindal* C. J. in the case there cited in the note to p. 320. The point must have occurred more rarely before the new rules of pleading, because special pleas,

(a) 1 C. & P. 284.

(b) 8 C. & P. 97. See also *Buller v. Carver*, 2 Star. 433.

(c) M. & M. 319.

disclosing

disclosing the interest of parties on the face of the record, were not then usual.

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LORD DENMAN C. J. This is a question of practice, and I never, in my experience, knew any practice prevail different from that which was adopted in this case.

LITLEDALE J. The fact, that the witness's name is on the record, and that his interest is alleged in it, makes no difference in principle. He knows nothing about the record, and cannot, therefore, on that account, be presumed to have had notice of the objection that would be made to his testimony.

PATTESON J. (a) concurred.

S.

Rule discharged.

(a) *Williams J.* was absent.

EVANS *against* FRYER.

Monday,
June 17th.

ASSUMPSIT. The first count of the declaration stated that, at the time of the making of the promise &c., a certain railroad was intended to be made from *Birmingham* in the county of *Warwick*, to join a certain other railroad theretofore made from *Manchester* to *Liverpool* respectively in the county of *Lancaster*, and so to form a railroad *for the conveyance of passengers and goods* to and from *Birmingham* aforesaid,

Assumpsit on a wager that a railroad would be completed *for the general conveyance of passengers* to *A.* and *B.* within six years. Averment, that it was completed *for the general conveyance of passengers* to *A.* and

B. within six years. Plea, traversing the averment.

Held that, under stat. 3 & 4 *W. 4. c. 42. s. 23.*, the judge at Nisi Prius might amend the record, agreeably to the evidence, by striking out the words "*for the general conveyance of passengers*" in the declaration and plea.

S s 4

and

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and *Liverpool* aforesaid. And thereupon, heretofore, viz. 14th *July* 1831, a discourse was had between plaintiff and defendant of and concerning the said intended railroad, and the probable length of time which would elapse before it was completed *for the general conveyance of passengers* to and from *Liverpool* aforesaid and *Birmingham* aforesaid; and, upon that discourse, plaintiff then affirmed that a railroad would be completed *for the general conveyance of passengers* to and from *Liverpool* aforesaid and *Birmingham* aforesaid in six years from the said 14th day of *July* 1831, which defendant then denied, and affirmed that no railroad would be completed *for the general conveyance of passengers* to and from *Liverpool* and *Birmingham* aforesaid in six years from the said 14th day &c., and thereupon afterwards, viz. on &c., in consideration that plaintiff, at the request of defendant, had then promised defendant to pay him 50*l.* if a railroad was not completed *for the general conveyance of passengers* to and from *Liverpool* aforesaid and *Birmingham* aforesaid in six years from the said 14th day &c., defendant then promised plaintiff to pay him 150*l.* if a railroad was completed *for the general conveyance of passengers* to and from *Liverpool* aforesaid and *Birmingham* aforesaid in six years from the said 14th day &c. Averment, that a railroad was completed *for the general conveyance of passengers* to and from *Liverpool* aforesaid and *Birmingham* aforesaid in six years from the said 14th day &c., that is to say on 4th *July* 1837, whereof defendant on &c. had notice, whereby he became liable to pay, &c. Second count on an account stated.

Pleas. 1. Non assumpsit. 2. As to the first count, that the said railroad was not completed *for the general conveyance*

veyance of passengers to and from *Liverpool* aforesaid
 | *Birmingham* aforesaid in six years from the said
 | July 1831, in manner and form &c. Conclusion
 | the country. Issues on the two pleas.

On the trial before *Park J.* at the *Warwickshire*
 ring assizes, 1838, the evidence as to the terms of
 : wager was given by the plaintiff's attorney, who
 : ted that, at the expiration of the six years, a dispute
 : ring arisen on the wager, he, as attorney for the plain-
 : , called on defendant, who admitted the bet but said
 : t he had won. The witness then said, "I believe
 : r bet was 150*l.* to 50*l.* that a railroad would not be
 : npleted for the general conveyance of passengers to
 : l from *Liverpool* to *Birmingham* in six years from the
 : th July, 1831." Defendant answered, "My bet
 : s, a railroad would not be completed from *Liverpool*
 : *Birmingham* in six years." It appeared that, within
 : six years, the railway was completed from *Liverpool*
 : a terminus, at the *Birmingham* end, called *Vauxhall* ;
 : l the contest between the parties had been before
 : bringing of the action, and was at the trial until
 : close of the plaintiff's case, whether the railway to
 : *irmingham* could be deemed complete when carried
 : ly to *Vauxhall*. It appeared, also, that the railway
 : s opened within the six years for conveying passen-
 : s, and goods of some descriptions, but not heavy
 : ods, which, at the time of such opening, the railway
 : npany did not intend to convey. When the plain-
 : 's case was concluded, the defendant's counsel con-
 : ded that there must be a nonsuit on the ground of
 : riance between the wager proved and that stated in
 : e declaration. The plaintiff's counsel then prayed
 : at the record might be amended, under stat. 3 &

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4 W. 4. c. 42. s. 23.; and *Park J.* permitted the declaration and plea to be amended by striking out the words "for the conveyance of passengers and goods" in the declaration, and the words "for the general conveyance of passengers," wherever they occurred. The defendant's counsel objected altogether to the amendment, and did not pray to be admitted to any terms, in consequence of it, under sect. 23. He addressed the jury on the question, whether or not the railway had been completed within the six years; and the jury, without hearing the case summed up, found a verdict for the plaintiff. *Humfrey*, in *Easter* term 1838, obtained a rule nisi for a new trial, on the ground that the amendment put a new and unexpected issue on the plaintiff, and was unwarranted by the statute.

Goulburn Serjt. and *Hildyard* now shewed cause. The variance was (according to the language of stat. 3 & 4 W. 4. c. 42. s. 23) in a particular "not material to the merits of the case, and by which the" defendant "cannot have been prejudiced in the conduct of his" "defence." Not only was the defendant not prejudiced, but his situation was bettered, for the amendment removed a qualification which was in the plaintiff's favour, and obliged him to prove that the road was "completed," in the full sense, and not merely "for the general conveyance of passengers." And he did in fact prove that the railway had been completed for that and every purpose originally contemplated. *Whitwill v. Scheer* (a) and *Sainsbury v. Matthews* (b) afford precedents fully justifying the course here taken.

() 8 A. & E. 301.

(b) 4 M. & W. 343.

Humfrey

Humfrey and Waddington, contra. The real question is, whether the amendment introduced an issue differing, on the merits, from the original one. The judge has no power to make an amendment altering the state of the case on the merits. Here the defendant had pleaded that he did not make a certain bet: issue was joined on the plea; and it had appeared, by the evidence given, that the defendant was entitled to succeed, and recover costs, on that issue. He ought not, then, to have been compelled to take a different one. [*Patteson J.* That argument would apply to every case where a contract has been declared upon and denied. It would defeat the statutory provision.] There is no instance of an amendment under the act which has so completely brought a new state of facts into dispute. The amendment in *Sainsbury v. Matthews* (a) did not go so far; nor did that in *Hanbury v. Ella* (b), where "guarantee" was substituted for "pay," it being clear from the record itself that a guarantee was contemplated. Here the statement of the bet, as amended, introduced an entirely new proposition, and required a different line of proof. The wager, as declared upon, was, that the railroad would be completed for the general conveyance of passengers; as amended, it was, that the railroad would be completed, which might mean completed for all purposes of carriage, or completed merely by the machinery being all laid down. Whatever may be the effect of such an alteration, the judge has no right, by making it, to compel a party to plead that which he does not wish to plead, and which perhaps is not true. [*Williams J.* You might have

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(a) 4 M. & W. 343.

(b) 1 A. & E. 61.

said

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said, when the amendment was proposed, that you could not deny the fact as then stated. *Littledale J.* The judge might then, under the act, have compelled the plaintiff to pay all the costs of your original plea. *Patteson J.* The judge cannot amend where the alteration is material to the merits. You shew, here, that it was not so, and that you came into Court merely to nonsuit the plaintiff. The clause was introduced to avoid that.] The learned Judge should have had the facts found specially and the finding entered on the record, under sect. 24.

LITTLEDALE J. (a) I think there is no ground for a new trial. It is true, as the plaintiff's counsel say, that the amendment imposed an additional burden of proof; but on whom? On the plaintiff. He, and not the defendant, was prejudiced. The defendant has nothing to allege but that the declaration, as it originally stood, was not, in form and in point of law, maintainable under the circumstances. The alteration did not affect the merits.

PATTESON J. If the amendment had taken off any burden of proof from the plaintiff, there would have been truth in the argument for this rule. But it could not do so, unless we are to suppose that the *wager*, as it ultimately stood, that a railway would be *completed*, meant merely that the rails would be laid down and fit to be used. I think it would be trifling to say this. The words must be taken to mean that the railway should be complete so as to be in public use. And, if so, the

(a) Lord Denman C. J. had left the Court.

ndment threw a rather larger onus of proof upon plaintiff than he took upon himself at first. The ndant cannot complain that the merits are altered use this additional burden is laid upon his adver- . If he really went to trial relying upon the vari- , his counsel, when the mistake was corrected, old have demanded such terms as would have ended him then to give the real answer, if he had one, the merits. But I do not believe that he went to in any such reliance.

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VILLIAMS J. This amendment was properly made; ause, if the power of amending were not liberally exercised, it would be a grievous hardship that only one nt is permitted on one subject of complaint. And amendment could not be disadvantageous on the its, as far as the defendant was concerned. It would rifling to say that a railway being completed meant y the laying down of the tram-road. The meaning rly was, that it should be complete for all the purposes of a railroad; for the carriage of goods as well as 1. And, if so, the plaintiff had more to prove on the ended than on the original issue.

Rule discharged.

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Tuesday,
June 18th.

WAIN against BAILEY.

The maker of a note, not negotiable, cannot refuse to pay the amount when due, on the ground that the payee has not got it in his possession or power, and cannot produce it for the purpose of delivering it up to the maker on payment.

ASSUMPSIT on a promissory note made by defendant, payable to plaintiff [not to order, or bearer] on the 25th *March*. Plea, that, when the note became due, to wit on &c., defendant was ready and willing to have paid plaintiff the amount of the said note, whereof plaintiff then had notice, and defendant then requested plaintiff to produce the said note for the purpose of the same being delivered up to him, the defendant, on payment of the amount thereof; but that plaintiff, when so requested to produce the same for the purpose aforesaid, had not the said note in his power, custody, or possession, nor could then deliver or have delivered it up to defendant, and confessed and admitted that he could not then deliver up the same to defendant, if defendant should then pay the amount thereof. Whereupon defendant did then refuse to plaintiff the amount of the said note, as he lawfully might &c.; and defendant says that he has always, since the said note became due, and since the said admission and confession of the plaintiff, been, and still is, ready and willing to pay plaintiff the amount of the note on the same being produced and delivered up to him on payment thereof; but plaintiff has never since produced or offered to deliver it up to defendant on payment thereof &c. Verification. Replication, *de injuria absque tali* &c.

The action was tried at the *Derbyshire* Spring assizes, 1838, when a verdict was found for the defendant.

In *Easter* term following, *Clarke* obtained a rule to shew

shew cause why judgment should not be entered for the plaintiff *non obstante veredicto*.

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Whitehurst now shewed cause. The question on this record is, whether the maker of a note, who is ready, and offers, to pay it when due, is bound to do so except upon redelivery? *Hansard v. Robinson* (a) is in point. It was there decided that the holder of such a security cannot sue upon it without producing and offering to deliver it up. Lord *Tenterden* there says, "What is the custom in this respect? It is that the holder of the bill shall present the instrument at its maturity to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge pro tanto in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer, or retain his money?" Supposing the note to have been negotiable, this would be a direct authority? [*Patteson J.* It shews only that the holder cannot recover on a lost note; it was not decided that he could not have recovered if he had found it.] The reason assigned, namely, the want of a voucher and security against a second demand, applies equally whether the note be lost or not. The only distinction is the non-negotiability of the bill in this case. But that is not a sufficient protection, for the plaintiff may have pledged or equitably assigned it. Even if he has not parted with it, the defendant ought not to be exposed to the difficulty of proving

(a) 7 B. & C. 90.

payment

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payment, in case he should be again sued on it. He cannot, at common law, compel the plaintiff to give a receipt, and is not obliged to take a witness with him. [Patteson J. In *Rolt v. Watson* (a) the plaintiff was allowed to recover for goods sold, though defendant had accepted a bill for the amount, which had been lost before it had been indorsed by the drawer: your argument would equally apply to such a case. *Littledale J.* The defendant would be exposed to the same risk, if he were sued on a bond, which the obligee is not bound to redeliver.] The action is founded on the custom of merchants, for this is a note within the custom, though not negotiable; *Smith v. Kendall* (b), *Rex v. Box* (c): if so, the custom to redeliver on payment must be observed. The promise is only to pay agreeably to the custom.

Clarke, contra, was stopped by the Court.

Per Curiam (d). The plea is bad.

S. Rule absolute for judgment non obstante veredicto.

(a) 4 Bing. 273. (b) 6 T. R. 123. (c) 6 Taunt. 325.
(d) Lord Denman C. J., *Littledale*, *Patteson*, and *Williams* J.

1839.

WEDGEWOOD *against* HARTLEY and Others.Wednesday,
June 19th.

TRESPASS for breaking and entering the plaintiff's house and taking his goods.

Pleas. 1. That plaintiff held the house as tenant to the overseers and guardians of *U.* under a demise at a yearly rent of 10*l.*: justification of entry and seizure under a distress for rent in arrear. 2. A similar plea stating a tenancy to the same persons, on the same terms, by one *W. Wedgewood*, the elder. Replications to each plea denying the tenancy, and issues thereon.

At the trial before *Patteson J.*, at the *York Spring assizes*, 1838, the plaintiff's counsel stated, in opening the case, that the house belonged to *W. Wedgewood*, the elder, the plaintiff's father, who had built it himself on a piece of waste, and occupied it without acknowledgment or rent for twenty years and upwards; and that the plaintiff had been let into possession, in 1832, as tenant to him at the annual rent of 3*l.* To prove this, he called the wife of *Wedgewood* the elder, who stated, on cross-examination, that she had received rent from the plaintiff as tenant to her husband. She was objected to as incompetent, because her husband would be liable over to the plaintiff, in case a verdict should be found for the defendants. The learned judge, with some doubt, admitted the evidence, and the jury negatived both the pleas. In the following term, *S. Temple* obtained a rule nisi for a new trial on the above point.

Trespass for distraining on plaintiff. Plea, that *W.* held the premises as tenant to defendants, at a rent of 10*l.*; and distress for such rent. Replication, non tenuit.

The case opened for plaintiff at the trial was, that *W.* was seised in fee, and that plaintiff held the premises of him at a rent of 3*l.*

Held, that *W.*'s wife was not a competent witness for plaintiff to prove those facts, because, in the event of a verdict for defendants, *W.* would be liable over to plaintiff; and that the incompetency, being independent of any use that might be made of the verdict, was not removed by 3 & 4 *W. 4. c. 42. s. 26.*

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Alexander and W. H. Watson now shewed cause. *Wedgewood*, the elder, was not interested in disproving his own tenancy under the defendants; he was rather interested in proving it. If he had a title paramount to that of the defendants, it would not be affected by the verdict in this action. A verdict for the plaintiff will not be of any use to him, nor would a verdict for the defendants be in any way available against him. It would not alter the possession, or displace or prejudice his title: *Doe dem. Nightingale v. Maisey* (a). The rule, as laid down in *Doe dem. Teynham v. Tyler* (b), is, that a witness is interested "first, where he has a direct and immediate benefit from the event of the suit itself; and, secondly, where he may avail himself of the benefit of the verdict in support of his claim in a future action." Here the event cannot affect the witness's husband: *Simpson v. Pickering* (c). [*Patteson J.* The objection was, that if the defendants established a right to distrain on the plaintiff, he would have a right of action over against his father.] It does not appear upon what terms the plaintiff held of his father, or that the latter was in any way bound to indemnify his son. A distress is not an eviction. The defendants are bound to shew every thing that is necessary to disqualify the witness, and cannot call upon the Court to presume liabilities which do not appear.

S. Temple, contra. This is a case of incompetency arising from an interest in the result of the cause, independently of any use that may be made of the verdict.

(a) 1 B. & Ad. 439. See also *Rees v. Walters*, 3 M. & W. 527.

(b) 6 Bing. 390. See judgment, *ibid.* 394.

(c) 1 C. M. & R. 527.

In an action by the plaintiff against his father to indemnify him for the rent recovered by the distress, he would be able shew the title of the overseers, and the distress by, and payment to, them, by their evidence, without producing the record of this action. The objection is therefore not removed by 3 & 4 W. 4. c. 42. s. 26.; *Harding v. Cobley (a)*. It is unnecessary to shew any express covenant or contract to indemnify the plaintiff, for there will be an implied legal liability to do so. If, indeed, the witness had admitted a tenancy by her husband under the defendants, and the plaintiff had been a sub-tenant at the same, or a greater rent, which rent was in arrear at the time of the distress, there would then have been no liability over; but here the facts, to be proved by the witness, are repugnant to the defendants' title. If the plaintiff's case is a true one, *Wedge-wood*, the elder, will not lose his rent; if the defendants succeed, then the plaintiff has been subjected by his landlord to liabilities to a larger amount than his own rent, and will be entitled to be reimbursed.

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Lord DENMAN C. J. There are two pleas; one asserting a tenancy under the overseers by the son; the other by the father. The wife of the father is called as a witness to negative the latter plea. There is a direct interest in disproving it; for if such a tenancy exists, *Wedge-wood*, the elder, will be liable over to the plaintiff to indemnify him for a payment which he is obliged to make through his father's default.

PATTESON J. The incompetency here is not by reason of the admissibility of the verdict or judgment as

(a) 6 C. & P. 664. See *Yeomans v. Legh*, 2 M. & W. 419. contra.

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evidence for or against the witness, but is independent of that reason. The fact of the father's tenancy is in issue. If it be established, he is liable to an annual rent of 10*l.*, which the plaintiff will be obliged to pay. The plaintiff's own rent is only 3*l.*; so that, even supposing his own rent to be in arrear (which does not appear), he will have to pay more than he has the means of retaining out of it. It is clear that he would have a remedy to recover this against his father, who is therefore immediately interested in defeating the claim of the defendants.

WILLIAMS J. concurred.

COLERIDGE J. It seems to be conceded that liability over to the plaintiff is an interest which will exclude the witness. Here the witness has shewn a tenancy between the father and son, as on the *voire dire*. Nor does the competency turn on the question, whether the son has, or has not, paid his own rent. The rents are different, and may be payable on different days, and the plaintiff may have been distrained upon before his own became due.

S.

Rule absolute for a new trial.

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SWANN *against* SUTTON.Thursday,
June 20th.

ASSUMPSIT for goods sold and delivered, work and materials, and money paid, and on an account stated.

Plea, that plaintiff ought not further to maintain his action &c., because, after the causes of action accrued, and after the commencement of this suit, to wit on &c., plaintiff, then being a prisoner in actual custody &c., on process for debt &c., did, according to the act of 7 G. 4. (c. 57.), petition the Insolvent Debtors' Court for his discharge, and plaintiff did, at the time of subscribing the said petition, to wit on &c., duly execute a conveyance and assignment to *Samuel Sturgis*, then being the provisional assignee of the said court, in the form annexed to the statute, of all the estate, right, &c., in and to all the real and personal estate and effects of plaintiff &c., and all debts due to plaintiff; and, by force of the said act, conveyance and assignment, all the estate, right, &c., of plaintiff in and to the said debts and causes of action in the declaration mentioned, &c., became and were vested in the said *S. Sturgis* as such provisional assignee, on the trusts and for the purposes in the act mentioned. Verification.

Replication. That heretofore and after the said assignment to *S. Sturgis*, viz. on &c., he the said *S. Sturgis* had express notice of this suit commenced and prosecuted against the defendant, and of the cause for which the same had been and was commenced and prose-

To assumpsit for goods sold, &c., it is a good plea in bar of further maintenance &c. that, after action commenced, plaintiff took the benefit of the Insolvent Debtors' Act, 7 G. 4. c. 57., and assigned to the provisional assignee, whereby plaintiff's right of action vested in such assignee.

Replication to such plea, that, after assignment, the provisional assignee had notice of such suit, and permitted it to continue, until he afterwards (and after the above plea pleaded) assigned to other assignees appointed by the Insolvent Debtors' Court; that such assignees afterwards had notice of the suit, and assented to its being continued for the benefit of the creditors; and that it is so continued with

their consent and on their behalf as such assignees: Held bad on general demurrer.

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cuted : and that afterwards, and after such notice, to wit on &c., and from thence until the making of the indenture herein mentioned, he the said *S. Sturgis* suffered and permitted the said suit to remain and continue pending, and to be prosecuted and carried on by and in the name of plaintiff. Averment, that afterwards, and after the pleading by defendant of the plea above pleaded, viz. on &c., *William Wallis* and *Enoch Blakemore*, being creditors of plaintiff at the time of the arrest and commencement of the imprisonment of plaintiff upon which he petitioned &c. in manner and form aforesaid, were duly appointed in and by the said Court to be assignees of the estate and effects of plaintiff: and that afterwards, to wit on &c., by a certain indenture of assignment bearing date, to wit &c.: (Assignment by *Sturgis* to *Wallis* and *Blakemore* of all the estate, right, &c., of in and to all the real and personal estate and effects which, by virtue of the conveyance and assignment in the plea mentioned, were in any way vested in *S. Sturgis* as provisional assignee, habendum to *Wallis* and *Blakemore* in trust for the creditors of plaintiff who should be entitled to a dividend): that *Wallis* and *Blakemore* afterwards, to wit on &c., had express notice of the said suit so commenced and prosecuted and depending as aforesaid, and of the cause for which the same had been and was so commenced and prosecuted, and then expressly assented to the said suit, and that the same and the proceedings therein should be continued and prosecuted by plaintiff for and on behalf of the said *W. Wallis* and *E. Blakemore* as such assignees as aforesaid, and for the benefit of the several persons creditors of plaintiff at the time of the arrest and the commencement of the imprisonment upon which he so petitioned &c. as aforesaid.

aforesaid. Averment, that the same suit is now continued and prosecuted in his name, with the express privity and approbation and consent of the said *W. Wallis* and *E. Blakemore*, and for and on their behalf as such assignees as aforesaid. Verification.

General demurrer, and joinder.

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Crompton, for the defendant. The assignees cannot continue this action in the plaintiff's name; for the sum to be recovered, and the right to sue for it, are vested absolutely in themselves. The plea is unanswered. In *Kinnear v. Tarrant* (a) a similar plea, of the plaintiff's bankruptcy, was pleaded to a declaration in scire facias, and held good on demurrer to a replication alleging that the action was continued by the assignees for the benefit of the creditors. The law of that case is recognised in *Biggs v. Cox* (b) and *Baylis v. Hayward* (c), and is supported by the distinction often drawn in cases regarding property acquired after bankruptcy, where it has been held that in respect of such property an uncertificated bankrupt may sue in his own name if the assignees do not interfere, but not so if the property was acquired before the bankruptcy. *Drayton v. Dale* (d) is a case of this class; and *Taylor v. Buchanan* (e) and *Lea v. Telfer* (g) shew that the same principles, as to the bringing of actions, prevail in cases of insolvency as in that of bankruptcy. The statutory provisions in the one case are, in effect, the same as those in the other. *Guinness v. Carroll* (h) may be cited, but is no real exception to the rule de-

(a) 15 *East*, 622.

(c) 4 *A. & E.* 256.

(e) 4 *B. & C.* 419, 420.

(h) 1 *B. & Ad.* 459.

(b) 4 *B. & C.* 920.

(d) 2 *B. & C.* 293.

(g) 1 *Carr. & P.* 146.

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duced from the other cases. There a judgment entered up by the plaintiff, after bankruptcy and assignment, on a warrant of attorney given before the bankruptcy, was held to be regular. But the obtaining judgment on a warrant of attorney is a peculiar proceeding; and, as *Patteson J.* suggested there, "if the warrant of attorney was given to enter up judgment in the bankrupt's name and no other, the assignees could not have made themselves parties in any other way than by using his name." [*Patteson J.* This plaintiff took the benefit of the Insolvent Act after having commenced the present action. Why may not the assignees go on with the action in his name till final judgment, as was done in *Bibbins v. Mantel (a)*? Before final judgment they cannot have a scire facias to put them on the record.] The answer is pointed out in *Kinnear v. Tarrant (b)*: the plaintiff, in *Bibbins v. Mantel (a)*, had obtained interlocutory judgment, and a writ of enquiry had been awarded before the bankruptcy; and the action was held to be properly carried on in his name till final judgment, because the defendant had no day in Court, and could no longer plead any thing to the action (*c*). The same reason does not apply here.

Archbold, contra. That point was taken in argument in *Kinnear v. Tarrant (b)*; but the judgment does not turn upon it. Nothing, as to the scire facias, had been done in that case before the commission, except issuing process, which was not alleged to have been served when the commission issued. The decision in *Biggs v. Cox (d)* was that the assignees might sue on promises,

(a) 2 Wils. 358, 378. *Hewit v. Mantell*, 2 Wils. 372.

(b) 15 East, 622.

(c) *Hewit v. Mantell*, 2 Wils. 372.

(d) 4 B. & C. 920.

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while an action commenced against the same party by the bankrupt before his bankruptcy, on the same promises, was still depending; and there is no doubt that in such a case assignees may either adopt the bankrupt's action or commence a new one. Indeed it would be hard on assignees to be bound by the bankrupt's action, in which some proceeding might be defective. In *Baylis v. Hayward* (a), where the declaration was in scire facias on a judgment, and bankruptcy of the plaintiff was pleaded, it did not appear that the plaintiff had not become bankrupt before the original action was brought; if so, the assignees could not have commenced that action in the bankrupt's name, though they might have adopted it if commenced by him before the bankruptcy. Where a plaintiff becomes insolvent pending the action, it is a common practice to require security for costs from the assignees, or a creditor (b); the Courts thus recognising the fact that the suit is carried on for the benefit of the creditors. The alleged reason for allowing assignees to proceed in the name of the bankrupt after interlocutory judgment and not before, namely that the defendant had no longer a day in court, is not satisfactory, for he might raise the objection by *audita querela*. In *Waugh v. Austen* (c) the plaintiff became bankrupt between interlocutory and final judgment, and afterwards sued out execution in his own name; and, on motion to discharge the defendant out of custody on the ground of irregularity, the answer given by this Court was, "that the bankruptcy of the plaintiff did not abate the suit; and that they had in several in-

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(a) 4 A. & E. 256.

(b) See *Heaford v. Knight*, 2 B. & C. 579. *Doyle v. Anderson*, 2 Dowl. P. C. 506.

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stances permitted the assignees to continue a suit commenced by a bankrupt in his name." [Patteson J. How do you distinguish the present case from *Minchin v. Hart* (a)?] The assignees there repudiated the action by not giving security for costs. [Patteson J. It does not appear that they had refused. And Bayley J. said that the Court would not have ordered security if they had known that the defendant meant to plead the bankruptcy of the plaintiff.] The pleadings in that case had not gone on to a replication, as here. And it does not appear what the nature of the action was: it might have been one which the assignees could not adopt. The judgment of the Court of Common Pleas in *Bibbins v. Mantel* (b) is an authority in favour of the plaintiff; and the reporter there adds, "Nota, there is no case on the point to be found in the books; but the statute 21 Jac. 1. c. 19. enacts, that the laws against bankrupts shall be in all things largely and beneficially construed for the relief of the creditors." *Kretchman v. Beyer* (c) is also in the plaintiff's favour. There the defendant below brought a writ of error which was duly issued, allowed and served; the plaintiff below became bankrupt; the assignees sued out a scire facias; and this Court quashed the sci. fa., saying "the assignees should have gone on with the writ of error in the bankrupt's name till judgment." Buller J. there stated the rule to be, "that the assignees cannot make themselves parties to the record in any intermediate stage of the proceeding, but it must be immediately after judgment; though an interlocutory judgment is sufficient for that purpose."

(a) 1 Chitt. Rep. 215.

(b) 2 Wils. 358. See *Hewit v. Mantell*, 2 Wils. 372.

(c) 1 T. R. 463

Swann v. Carroll (a) is a clear authority for the plain-

There the action was brought in the plaintiff's name on a judgment signed after he became bankrupt; the defendant pleaded bankruptcy of the plaintiff and assignment of his effects before judgment signed; and

Court held the pleas bad. The judgment was upon warrant of attorney to enter up judgment on a bond; Lord Tenterden said: "The assignee might avail himself of the warrant of attorney, and enter up judgment in the bankrupt's name, or he might, as assignee, in his own name upon the bond. By taking one remedy he would waive the other; and if he did not upon the bond, it cannot be supposed but that he meant to take the benefit of the warrant of attorney. It is immaterial to the defendant in which way the debt recovered." [Lord Denman C. J. Suppose the invent here were to obtain judgment, and the assignees were then to bring another action on the same process.] The answer would be that this action was under the control of the assignees. [Lord Denman C. J. The defendant does not know that.] The same observation might have been made in *Bibbins v. Mantel* (b) and *Waugh v. Austen* (c). But the defendant may ascertain the fact. He may call on the assignees to give security for costs. The Insolvent Debtors' Act, 7 G. 4. c. 57., and the bankrupt acts, are not so far analogous as was suggested on the other side. Stat. 6 G. 4. c. 16. s. 63., adopted from stat. 1 Jac. 1. c. 15. s. 13., disables the bankrupt, after assignment, from recovering or releasing any debt due to him: stat. 7 G. 4. c. 57. does not go so far in any of its provisions.

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(a) 1 B. & Ad. 459.

(b) 2 Wils. 358.

(c) 3 T. R. 437.

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Crompton, in reply. *Kinnear v. Tarrant* (a) did not at all turn (as has been suggested) upon the state of the cause as to service of process. And the observation on that subject does not apply to *Minchin v. Hart* (b). This last case shews that the practice as to security for costs does not affect the right of a defendant to plead the bankruptcy of the plaintiff. It is said that the assignees there had repudiated the action; but that does not appear. They might have come in and replied to the plea of bankruptcy, as in the present case. Lord *Tenterden* did say, in *Guinness v. Carroll* (c), that the assignee might proceed in the bankrupt's name; and no doubt he might, but not if a plea of bankruptcy were pleaded. In *Kinnear v. Tarrant* (a) the earlier cases now cited were under consideration, and, in *Biggs v. Cox* (d), *Bayley J.* observes that the judgment of the Court in *Kinnear v. Tarrant* (a) "corrected the former decisions in which it was held that assignees might continue suits commenced by the bankrupt, and decided that defendants might insist upon stopping such suits and force the assignees to become plaintiffs, so that it might appear upon the record to whom the payment compelled by the judgment was made." (He was then stopped by the Court.)

LORD DENMAN C. J. I think this plea is good, and not answered. Since the plaintiff brought his action, all his rights have been transferred by the insolvency; and the defendant is at liberty to plead that fact. The practice as to security for costs leaves the right untouched.

(a) 15 *East*, 622.(c) 1 *B. & Ad.* 459.(b) 1 *Chitt. Rep.* 215.(d) 4 *B. & C.* 990.

LITTLEDALE J. The authorities shew that an insolvent could not commence an action after his insolvency; and, if so, neither can he continue it. In *Kinnear v. Tarrant* (a) the plea was clearly good, supposing the requisite steps to have been taken for bringing a *scire facias*, before the bankruptcy. In *Minchin v. Hart* (b) the plea of bankruptcy was held good; and in *Bretherton v. Osborne* (c), before me, the sufficiency of such a plea was not disputed. The plaintiff has, by taking the benefit of the Insolvent Debtors' Act, disabled himself from continuing the suit; and that is a good defence. A distinction was suggested between the insolvent and bankrupt acts: but all the rights of action are transferred in the one case as well as the other.

PATTESON J. The argument for the plaintiff proceeds on the supposition that the practice of obliging assignees to give security for costs deprives a defendant of his right to plead the bankruptcy or insolvency. But the practice cannot take away the legal right of pleading such a defence.

WILLIAMS J. concurred.

Judgment for defendant.

(a) 15 *East*, 622.

(c) 1 *Dowl. P. C.* 457.

(b) 1 *Chitt. Rep.* 215.

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1839.

Friday,
June 21st.

CALVERT *against* MOGGS.

Debt for goods sold and delivered, money had and received, and on an account stated. Plea, nil debet (pleaded before *Reg. Gen. Trin. 1 Vict.* requiring the words "by statute"). Special demurrer. Held that, since the new rules of pleading, the plea could, under no circumstances, be good as to the last count; and that, being pleaded to the whole declaration, it was bad for the whole.

DEBT for goods sold and delivered and money had and received, and on an account stated. Plea, nil debet (in the common form.) Demurrer, assigning for special cause, that the plea of nil debet is, by the new rules of pleading, not allowed in any action (a). The plea was pleaded before *Reg. Gen. Trin. 1 Vict.* (b) requiring the words "By statute" in the margin.

Wightman, for the plaintiff. The new rules of pleading expressly prohibit the plea of nil debet to an action of debt; and *Smedley v. Joyce* (c) shews that advantage may be taken of this objection upon demurrer. [*Patteson* J. If it is no plea, why not take judgment by default?] It is dangerous to do so. The plea may be good as to part of the declaration.

Peacock, contra. The plea, if bad at all, is only bad by reason of the late rules of pleading. The plaintiff, therefore, ought to have gone before a judge to strike it out, and not to have demurred. Upon summons he might have called on the defendant to shew whether he pleaded nil debet by virtue of any statute. *Earl Spencer v. Swannell* (d) shews that the plea of nil debet is still pleadable in some cases. If we suppose (as the fact is), that the defendant is a surveyor of highways sued for the value of materials taken by him for repairs of

(a) *Reg. Gen. Hil. 4 W. 4. Pleadings in Particular Actions*, II. 5 B. & Ad. viii.

(b) 8 A. & E. 279. (c) 2 C. M. & R. 721. (d) 3 M. & W. 154.

roads by virtue of sect. 51 of the General Highway Act 5 & 6 W. 4. c. 50., then he has right to plead the general issue under sect. 109 of the same act. The plaintiff has waived the tort, and sues for goods sold, as he may do, if he can prove his property in the materials; *Lee v. Shore* (a), and the judgment of *Abbott C. J.* in that case. But such waiver will not deprive the defendant of the benefit of the statute. [*Wightman*. There is a count, on an account stated, to which the statute cannot possibly apply.] It is enough, on demurrer, if there be any supposable case, in which the plea would be good by statute. Now, under sect. 111, the surveyor may employ an attorney to defend prosecutions against the parish, and the plaintiff may be such an attorney, and may now be suing the defendant on a settlement of accounts between them. Besides, the demurrer is too large, for the plea must be taken as pleaded separately to each count. Now if the plea be good as to one, the plaintiff should have demurred to it so far only as it applied to the other; *Spyer v. Thelwell* (b), *Webb v. Baker* (c).

Wightman, in reply. The provision of such a statute, which gives the defendant the benefit of the general issue, cannot apply to a case like this. [*Littledale J.* referred to *Irving v. Wilson* (d) and *Greenway v. Hurd* (e).] An account stated, under the circumstances suggested, could not be within the protection of the statute. The provisions respecting the laying of the venue, and tendering amends, are inapplicable to such a state of

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against
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(a) 1 B. & C. 94, 97.

(b) 2 C. M. & R. 692. S. C. *Tyrwh. & Gr.* 191.(c) 7 A. & E. 841. See *Hartshorne v. Watson*, 4 New Ca. 178.

(d) 4 T. R. 485.

(e) 4 T. R. 553.

things.

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things. The plea, being disallowed except in certain cases, is *primâ facie* bad; and the defendant cannot be allowed to support it by suggesting possible circumstances, *dehors* the record, under which the plea may be admissible. There should be some suggestion, or allegation on the record, to shew that the defendant is availing himself of a statute; otherwise a demurrer will always be bad, where the plea may, by possibility, be a good one. In fact it will be useless to demur at all to any plea of the general issue. [*Patteson J.* Suppose a defendant were now to add to such a plea the words "by statute." How could we deal with it on demurrer?] If it were a mere trick, the plaintiff might go before a judge to make the defendant shew what statute was meant. But here there is nothing to indicate that the defendant relies on one at all. At all events, if the count upon an account stated be one to which the plea of *nil debet* must, under any circumstances, be inadmissible, then the plea, being pleaded to the whole declaration, is bad.

LORD DENMAN C. J. An action upon an account stated could never have been contemplated by the 109th section of 5 & 6 W. 4. c. 56. Then, the plea being pleaded to the whole declaration, the defendant cannot object that the demurrer goes to the whole plea.

LITLEDALE, PATTESON, and WILLIAMS Js. concurred.

Leave to amend the plea within a week
 on an affidavit of merits, otherwise

S.

Judgment for the plaintiff.

1839.

SKUSE *against* DAVIS.Friday,
June 21st.

TRESPASS for assaulting and beating the plaintiff.
Venue, *Surrey*.

Plea, that the trespasses were committed after the passing of stat. 9 G. 4. c. 31., and amounted to no more than a common assault and battery within the meaning of that act; and that, after the commission of the trespasses, upon complaint of plaintiff then made by him of the said trespasses, according to the said statute, defendant was summoned and appeared before G. O. and A. O., then being justices of the peace, &c. in and for the county of *Surrey*; and thereupon the said &c., so being such justices, did then dismiss the said complaint upon the hearing thereof, and thereupon did then, according to the said statute, forthwith make out a certificate under their hands, stating the facts (a) of such dismissal, and did then deliver such certificate to the defendant; whereby, and by force of the statute, defendant became, and still is, released from this action so far as relates to the said trespasses, &c. Verification.

Demurrer, for that it did not appear on what ground the complaint was dismissed; whether because the assault was not proved, or was justified, or was so trifling as not to deserve punishment; or because the justices had no jurisdiction. That the jurisdiction of the justices did not appear in the plea, inasmuch as it did not appear that the trespasses were committed in *Surrey*. That it did not appear that plaintiff caused defendant to be

Trespass for assault and battery; Plea, that plaintiff had complained of the same trespass to two justices, according to stat. 9 G. 4. c. 31. s. 27., who had dismissed the complaint, and, thereupon did, "according to the said statute, forthwith make out a certificate," "stating the fact of such dismissal," and delivered it to defendant, whereby defendant was released &c. Held, on special demurrer, that the plea was bad for not shewing that the complaint had been dismissed upon one of the grounds specified in sect. 27.; and, *semble*, the certificate itself ought to shew the ground of dismissal.

(a) See post, p. 638. note (a).

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against
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summoned before the justices, or that defendant was summoned before them. That it was not positively stated, but only by way of argument and inference, that the justices had heard the complaint, or heard or examined the plaintiff, or witnesses in his behalf. That the tenor and effect of the certificate ought to have been set out, whereby the Court might judge of the sufficiency of it to bar the plaintiff; and that the facts of such dismissal, alleged to have been stated in the certificate, ought to have been set forth.

Byles, for the plaintiff. The plea ought to have set forth the tenor or effect of the certificate, so as to shew upon what grounds the complaint was dismissed; for it is only a bar when dismissed on certain grounds. Sect. 27 of stat. 9 G. 4. c. 31. provides that where complaint is made before two justices of a common assault or battery, "if the justices, upon the hearing of any such case of assault or battery, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of *such* dismissal, and shall deliver such certificate to the party against whom the complaint was preferred." Sect. 28 enacts that any person who obtains such certificate, or, being convicted, shall have paid the fine or suffered the imprisonment awarded for non-payment, shall be released from all further proceedings, civil or criminal, for the same cause. Sect. 29 provides that in case the justices shall find the assault or battery to have been accompanied by an attempt to commit felony, or shall be of opinion that
it

it is a fit subject for an indictment, they shall abstain from any adjudication thereupon, and shall deal with the case as before the passing of the act ; and there is a further proviso that the act shall not authorise justices to hear and determine a case in which any question shall arise as to title to lands, &c., or as to bankruptcy or insolvency, or execution under process. Hence it appears that a certificate is no defence unless in the case of dismissal upon one of the three grounds mentioned in sect. 27, viz., want of proof; a justification; or the trifling nature of the offence. Here no such grounds are stated in the plea, or alleged to have been set forth in the certificate. The complaint may have been dismissed on one of the grounds referred to in sect. 29. [*Patteson J.* The justices are not to give a certificate in cases within sect. 29. Your argument, therefore, supposes that they have acted irregularly in this respect.] Nothing is to be presumed in support of the acts of an inferior jurisdiction. [He then argued that the plea should have shewn the offence complained of to have been committed within the jurisdiction of the justices of the county of *Surrey*; and he cited *Helier v. Hundred de Benhurst* (a), 2 *Hale P. C.* 50, 51, and 5 & 6 *W.* 4. c. 19. s. 38. Upon that point it became unnecessary to give any judgment; but the Court intimated an opinion, that as the venue was laid in *Surrey*, and the justices were alleged in the plea to have been justices for that county, it must be presumed that the assault was committed within their jurisdiction; and that, at all events, they were the justices before whom the plaintiff had chosen to make his complaint.]

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(a) *Cro. Car.* 211.

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M. Chambers, contra. The plea exactly follows the words of the act. Though it requires a certificate stating "the *fact* of such dismissal," it does not require the *facts* (a) to be stated, upon which the dismissal was founded. Where a statute requires notice of an appeal, general notice is sufficient, unless the statute also requires the cause or ground to be specified. The certificate is alleged to have been made "according to the statute," that is, legally and regularly; and the complaint is also stated to have been so made; it is, therefore, to be presumed that all was regular, and that the case was one in which a certificate was proper. The rule "*omnia præsumentur ritè acta*" applies, and the intendment must be in favour of the justices who gave this certificate. If the dismissal took place on any of the grounds mentioned in sect. 29, or for want of jurisdiction, the plaintiff ought to have stated that in a replication. But, in fact, no certificate at all would be grantable in those cases. Credit must be given to the justices for the regularity of their acts, for they do not constitute what is usually called an inferior court, but a tribunal of a special nature, established by statute for certain purposes.

Byles, in reply. The words "*such dismissal*" mean a dismissal under the special circumstances particularised by the statute. The certificate, therefore, ought to specify the circumstances, otherwise the party has no means of knowing whether it is, or is not, a bar to further proceedings; for the justices are not bound to assign reasons for their judgment upon a complaint. If the

(a) The word used in the plea was "*facts*;" but this was stated by the defendant's counsel to be a mistake for "*fact*."

certificate

certificate does not state the ground of dismissal, neither plaintiff nor defendant can tell the effect of it, or whether it be a legal certificate or not.

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LORD DENMAN C. J. The defendant does not bring himself within the protection of the statute, unless he shews the certificate to be legal and regular. The statute directs the justices to grant a certificate upon a dismissal in three cases only. Unless it be granted upon one of the grounds specified in the act, it is ineffectual; therefore it ought to shew the ground upon which it is given, otherwise neither party can know whether it is a bar or not.

PATTESON J. (a). I was at first inclined to think that the legal presumption in favour of the acts of the justices was sufficient to support the plea. But, upon consideration, I think we are bound to give some effect to the word "such." "Such dismissal" must mean a dismissal on one of the grounds mentioned in sect. 27; and the certificate ought, therefore, to state that the complaint had been dismissed upon one of those grounds.

WILLIAMS J. In the case of justices of the peace, their acts cannot be presumed to be legal and regular until their jurisdiction is shewn. There are only three cases in which their certificate will have the effect of protecting the defendant from an action; it ought, therefore, to appear to have been given on one of those three occasions.

Judgment for the plaintiff.

(a) *Littledale J.* was absent.

1839. *M. Chambers* then asked leave to amend, but

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Per Curiam. We never allow an amendment after argument.

S.

Friday,
June 21st.

ALLEN against FLICKER and Another.

Stat. 57 G. 3. c. 93. regulating the costs of distresses for rent not exceeding 20*l.*, has not repealed the provisions of 2 *W. & M. sess. 1. c. 5.*, so as to make an appraisement by one broker sufficient upon such distress.

CASE for distraining goods of the plaintiff for rent in arrear, and selling them without having the same previously appraised by two sworn appraisers, contrary to the form of the statute, &c.

Plea, that the arrears of rent so distrained for at the time of the distress amounted to less than 20*l.*, to wit, 1*l.* 12*s.* 6*d.* only; wherefore defendant did not cause the said goods to be appraised by two sworn appraisers. Verification.

Demurrer, assigning for causes that the plea attempted to raise an immaterial issue, namely, that the arrears of rent were under 20*l.*; that the fact of the arrears not exceeding 20*l.* was no defence; and that the plea amounted to a plea of not guilty. Joinder.

Heaton for the plaintiff. The principal question is, whether stat. 2 *W. & M. sess. 1. c. 5. s. 2.*, which requires two sworn appraisers to value goods distrained, is repealed as to distresses for rent not exceeding 20*l.* by stat. 57 G. 3. c. 93. The last statute enacts that no person making a distress for such rent, nor any person employed in making it, or doing any act in the course of such distress, shall receive out of the produce, or from the tenant, or landlord, or from any other person,

son, any more costs and charges for such distress or other matter, than such as is fixed and set forth "in the schedule hereunto annexed." The schedule fixes 6*d.* in the pound for the appraisement, "whether by one broker or more." *Fletcher v. Saunders* (a) will be relied upon to shew that one broker is enough. But *Bishop v. Bryant* (b), before *Tindal* C. J., is to the contrary. The schedule is no part of the act itself, but only annexed to it, and is, moreover, not inconsistent with the first act; for a single broker, or even no broker at all, may be employed by consent.

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O'Malley, contra. The last act is an extension of the powers of the first for the benefit of both parties, and in reduction of the expense of distresses. [*Patteson* J. The tenant will only have to pay 6*d.* in the pound, whatever be the number of brokers. It is, therefore, no benefit to the tenant, but to the landlord, that one only should be employed.] The schedule, which is engrafted on the act, evidently contemplates the employment of one broker, and can hardly be construed to refer to a case of irregular appraisement by consent, where parties are in a condition to arrange both the number of appraisers and expense of valuation. *Fletcher v. Saunders* (a) is in point, and was not questioned by any motion before the Court above.

LORD DENMAN C. J. It is clear to me that the act of 2 *W. & M. c. 5.* is in full force. The schedule of 57 *G. 3. c. 93.* probably refers to the case of the employment of a single appraiser by consent; but, at all

(a) 1 *Moo. & R.* 375.(b) 6 *C. & P.* 484.

1859. events, it is too loosely worded to operate as a repeal of the former act.

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PATTESON J. (a). It is possible that the latter act may have been framed with the object ascribed to it, of relieving parties from the expence of two brokers; but it would be giving too much effect to the loose words in the schedule, if we were to decide that they had repealed the positive directions of the preceding act. It might as well be argued that none but brokers can now be employed to appraise the goods distrained, because none but brokers are named in the same schedule.

WILLIAMS J. concurred.

S. Judgment for the plaintiff.

(a) *Littledale J.* was absent,

Friday,
June 21st.

FRANCIS *against* BAKER.

Assumpsit for money paid. Plea, that the money was paid by plaintiff as agent for defendant in the purchase of railway shares; that plaintiff thereupon received certificates of the title of said shares, and ought to have delivered them to defendant, but refused to

do so, and afterwards wrongfully converted them to his own use, whereby the shares and certificates became lost to defendant: Held, that the plea was bad, inasmuch as it either amounted to the general issue, or alleged matter that was no avoidance of the contract, but only ground of a cross action.

INDEBITATUS assumpsit for money paid for the use of defendant at his request. Plea, as to 100*l.* parcel &c., that the same was money paid in and for the purchase of certain railway shares by plaintiff as agent for defendant; and that plaintiff, after such payment, had thereupon delivered to him as such agent, and received as such agent, the certificates of title of the said shares for defendant, and ought, as such agent, to have delivered the same to defendant, in order that defendant might have sold and disposed of the shares to

his

his own use and benefit; but that plaintiff refused so to do; and after the said payment for such shares, and before the commencement of the suit, to wit, on &c., wrongfully and in breach of his duty as such agent, converted the certificates to his own use, whereby the said shares and certificates became lost to defendant. Verification.

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Demurrer, for that the plea amounted to the general issue; that it admitted 100*l.* payable to plaintiff on request, and that a breach of duty in a separate transaction was no satisfaction; that if the delivery of the certificate was a condition precedent, then 100*l.* did not become payable on request; that the plea was an argumentative denial that it was so payable, and, as such, amounted to the general issue; that defendant's liability to pay could not be discharged by a subsequent wrongful conversion by plaintiff, not proceeding from any fraud committed in the original accruing of the debt; that plaintiff had a right of action, if he acted legally and bonâ fide in making the payment, which was to be presumed; that the plea should have stated that the shares were of some, and of what value, and that defendant was damnified; that it both denied the debt and also avoided it by a discharge, &c. Joinder.

There was another plea, differing in some respects from the above, to which the plaintiff had also demurred; but as it was admitted in argument that the decision of the Court must be the same on both, this part of the pleadings has been omitted.

Channell, for the plaintiff. The plea either is an argumentative denial that the money was paid under circumstances to enable the plaintiff to sue for it, and therefore

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therefore amounts to the general issue; or is pleaded in confession and avoidance, in which case it admits the money to have been paid, yet shews no discharge or avoidance. It admits a payment by the plaintiff of the purchase money of shares belonging to the defendant, and sets up a conversion of the certificates as an excuse for refusing to repay the plaintiff. If it means that the defendant has received no benefit from the purchase of the shares, this is a defence under non assumpsit; *Cousins v. Paddon* (a). If it means that the plaintiff has improperly detained the certificates, this is only matter for a cross action. The plea was probably framed to invite a replication of *de injuriâ*, which would have been bad if the plea amounts to the general issue; *Parker v. Riley* (b).

Wightman, *contra*. This is a plea in confession and avoidance. It admits a payment for the defendant's use at his request, but states matter *ex post facto* to shew that the payment has become useless by reason of the detention of the certificates. It is not denied that the payment was originally of value to the defendant; but it is contended that he cannot be called upon to pay for that which the plaintiff will not deliver to him. Suppose the plaintiff bought a horse for the defendant, and shot it as soon as the purchase-money was paid, could he sue the defendant for money paid? It would be a great injustice to put the defendant to the circuitous remedy of an action of trover under such circumstances. *Fisher v. Samuda* (c) is, in principle, in favour of the plea. In *Cole v. Le Souef* (d), in an action

(a) 2 C. M. & R. 547. (b) 9 M. & W. 230. (c) 1 Camp. 190.

(d) 5 Dowl. P. C. 41. The plea was pleaded to a count upon an account stated, as well as money paid.

for

for money paid, the Court of C. P. inclined to the opinion that a special plea, stating that the insurances, effected by the plaintiff for the defendant, were invalid through the plaintiff's negligence, was good on special demurrer.

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LORD DENMAN C. J. The dilemma is not to be got rid of. The plea either denies the payment under circumstances to give any cause of action, and therefore amounts to the general issue; or it confesses, and seeks to avoid it, by subsequent matter, which is only ground of a cross action. In fact, the plea does not avoid the contract at all. The damages arising from the detention of the certificates may be greater or less than the amount of the purchase-money.

PATTERSON J. (a). The plea is a novelty, not in its facts, but in its principle; and no sufficient authority has been adduced to support it. In *Cole v. Le Souef* (b) there was no decision; but I incline to think that the plea in that case amounted to non assumpsit. There, however, the policies were never of any value to the defendant; here the shares vested in the defendant, and were, at least, of value till the subsequent conversion by the plaintiff. The conversion of the certificates was either ground of an action of trover, or, perhaps, of a set-off.

WILLIAMS J. Many matters may now be shewn or pleaded as a defence, which were formerly considered only the subjects of a cross action; but in all those cases the defence arises out of the terms of the very contract upon which the plaintiff sues. Here the subject of the

(a) *Littledale J.* was absent.

(b) 5 Dowl. P. C. 41.

plea

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BAKER.plea is matter subsequent to, and dehors, the contract,
and is merely tortious.

S.

Judgment for the plaintiff.

BARRY *against* ARNAUD.

A collector of customs, appointed by the commissioners under stat. 3 & 4 W. 4. c. 51. s. 6., to collect duties on articles coming into the kingdom, and, on payment, sign bills of entry which, by sect. 18, are a warrant for delivery of such articles to the party paying, is not a mere servant of the commissioners, but a substantive and immediate officer of the Crown; and his functions, as collector, are ministerial. Therefore, he is liable in an action for non-feasance in the exercise of his office; as for refusing to sign such bill of entry without payment of an excessive duty.

THE following case was stated by consent, under a Judge's order, for the opinion of this Court.

This action is brought by the plaintiff, a merchant of London, against the defendant, who was the collector of his late Majesty's customs, and employed in the said duty of collector by the order and with the concurrence of the commissioners of his said late Majesty's customs for the port of *Liverpool*, for refusing, on the 6th day of *August* 1836, to accept from the plaintiff the sum of 144*l.* 12*s.* 8*d.*, the same then being (as the plaintiff alleges) the full amount of the customs duty then due and payable to our lord the late King upon the delivery for home consumption of certain foreign goods, to w^hich 38,569 pounds' weight of unmanufactured tobacco, the being the property of the plaintiff, which had before then been brought or come into the United Kingdom and were then deposited in certain warehouses at *Liverpool*, and for refusing to sign a bill of entry of the said tobacco upon the due payment of the said sum, where

The term "wreck" in stat. 3 & 4 W. 4. c. 52. s. 50. is not necessarily limited to goods which become forfeit to the Crown or its grantee by not being claimed within a year and a day, according to stat. *Westminster* 1. (3 Ed. 1. c. 4.).

Goods were imported into this country, warehoused, entered for exportation, and shipped for *Belgium*: the vessel was lost within the *English* port, and the goods, being partly thrown upon the shore, and partly found floating on the sea and landed, were conveyed to the warehouse of the lord of the manor, and immediately claimed by the owner. Held, that they were chargeable with duty as "wreck, brought or coming into the United Kingdom" within stat. 3 & 4 W. 4. c. 52. s. 50.

by the plaintiff was prevented from obtaining the delivery of the said tobacco from the said warehouse, and from selling and disposing thereof to great advantage: and, the defendant having pleaded Not Guilty, and issue having been joined thereon, the parties have agreed to the following case.

In or about *March* 1836, the tobacco in question amounted to 38,569 pounds' weight, having been, together with a certain other quantity of the same, now lost, imported into *Great Britain* from the place of its growth, and warehoused in certain warehouses at *Liverpool*, in the county of *Lancaster*, being then the property of *W. & J. Brown & Co.*; was duly entered for exportation from the port of *Liverpool* by *Joseph Johnstone*, consigned to *J. Parswell Pilgrim* Esquire at *Antwerp*, in the kingdom of *Belgium*, and then shipped on board a ship called the *London Packet*, bound for *Antwerp*; with which tobacco the said ship sailed on the said intended voyage: but, shortly after leaving *Liverpool*, viz. on or about the 29th day of the said month of *March*, the said ship, after she got out of the limits of the port of *Liverpool*, met with contrary winds and bad weather, and was thereby forced and compelled to re-enter the limits of the said port, when and where she struck on certain sands in the *Irish* sea within the said limits, and was broken to pieces and became a total wreck, and all persons on board were drowned; but the tobacco in question, which formed part of the said ship's cargo, was saved; that is to say, some of it was found floating on the sea, and the remainder was thrown on the shore of the *English* coast by the sea, and was conveyed to the warehouse of *Mr. Atherton* the lord of the manor, into which the said tobacco was brought or came

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all such goods as cannot be sold for the amount of due thereon shall be delivered over to the lord of manor or other person entitled to receive the same, shall be deemed to be unenumerated goods (a)."

by stat. 3 & 4 W. 4. c. 56., schedule "Inwards," unenumerated goods, unmanufactured, are subject only ad valorem duty of 5*l.* for every 100*l.* of the value. The defendant was, at the time of the tender herein-mentioned, the collector of his late Majesty's customs for the port of *Liverpool*, and employed in the duty of collector by the order and with the concurrence of the Commissioners of his said Majesty's customs. His duty was to collect the proper amount of duty on each article for which an entry was tendered, upon such duty being paid, to sign a bill of entry acknowledging the receipt, and which then became a warrant authorising the delivery of such article from the charge of the proper officers. He had not, according to the proper course of his office, the actual custody or controul over, the articles upon which the duty was payable, nor had he in fact the actual custody of, or controul over, the tobacco in question; except that officers who had such actual custody and controul were not to deliver the article to the owner without such bill of entry being so signed.

On the 6th day of *August* 1836, the plaintiff tendered to the defendant the sum of 144*l.* 12*s.* 8*d.*, as and for customs duty due on the said tobacco on its being

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ad to allowance for damage, such allowance shall be made under regulations and conditions as the said commissioners shall from time to time direct: Provided also, that all such goods as cannot" &c.

"And shall be liable to and be charged with duty accordingly."

entered

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entered for home consumption, being at and after the rate of 5*l.* for every 100*l.* of the value of the said tobacco, and tendered to the defendant the usual bill of entry for the signature of the defendant, with two duplicates of the said bill of entry duly made and written, at the same time offering to deliver to the defendant as many more duplicates of the same as he should require; when the defendant refused to accept the said sum of 144*l.* 12*s.* 8*d.* in discharge of the customs duties due and payable in respect of the said tobacco, and also refused to sign the said bill of entry acknowledging the receipt, without which signature the officer having the custody of the tobacco could not deliver it to the plaintiff.

The questions for the opinion of the Court are: 1. Whether the tender was sufficient: and, if so, then, 2. Whether the defendant is liable to this action under the above circumstances. If the Court shall be of opinion in the affirmative on both the questions, then judgment to be entered for the plaintiff for the damages laid in the declaration to secure the delivery of the said tobacco to the plaintiff, on payment by the plaintiff to the Crown of the said sum of 144*l.* 12*s.* 8*d.*; and also to secure the payment of costs and of such further sum for damages as shall or may be awarded to the plaintiff by &c. [The case then named an arbitrator]. But if the Court shall be of opinion in the negative on either question, then the judgment to be entered for the defendant with costs.

The case was argued in last *Easter* term (a).

(a) *April* 26th, 1839. Before Lord Denman C. J., Littledale, Patteson, and Coleridge Js.

Channell,

Channell, for the plaintiff. First, the tender was proper. The goods, if imported, would have been subject to a duty of 3s. per pound; and the attempt is to claim that. If they were wreck, they fall within stat. 3 & 4 W. 4. c. 52. s. 50., by which foreign goods, derelict, jetsam, flotsam, and wreck, are subjected to the same duties as goods of the like kind imported, but with the proviso that, when they cannot be sold for the amount of duty, they shall be deemed "unenumerated goods;" and these, by stat. 3 & 4 W. 4. c. 56. Schedule, entitled "Duties of customs inwards," are subject only to the duty of 5l. for every 100l. of the value. The tobacco in question was wreck, and could not be sold for the amount of the duty on imported goods; and 5l. for every 100l. of the value was tendered.

It will be contended that the tobacco was not wreck; and it certainly was not so in the more strict sense, which applies to goods becoming the absolute property of the crown by non-claim within a year and a day, under stat. *Westminster* 1., 3 Ed. 1. c. 4. But the term is in a larger sense, in which it signifies all goods cast ashore by the sea from a vessel suffering shipwreck; and this is its meaning in stat. 3 & 4 W. 4. c. 52. s. 50. This subject, and the authorities upon it, were discussed in *The Bailiffs, &c., of Dunwich v. Sterry* (a), where the meanings now pointed out were insisted upon at the bar, and, in effect, recognized by the Court, it being held that the grantee of "wrecks of the sea" had, such, a special property in goods washed on shore from a shipwrecked vessel, before the lapse of a year and a day (within which time the owner claimed), and (a) 1 B. & Ad. 831.; and see *Sutton v. Buck*, 2 Taunt. 302, there

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falls out they be *bona peritura*, the sheriff may sell them within the year, and the sale is good; but he must account to the true owners." The same section goes on to point out how owners claiming "the wreck" shall proceed, saying that, if an action at law is commenced, it must be brought within the year and day.

Then, if the term "wreck" has two senses, in which of them is it used in stat. 3 & 4 W. 4. c. 52. s. 50.? Those claiming the duty must ascertain this precisely, because wrecked goods can be rendered liable to the customs only by some express enactment. The schedule of stat. 3 & 4 W. 4. c. 56., laying duties on imported goods, cannot affect these. *Molloy* says (book 2. c. 5. s. 9.) (a), "If goods were wrecked on the shore, and the lord having power, takes them, he shall not pay custom, neither by the common law, nor by the statute; for at the common law, wrecked goods could not be charged with custom, because at the common law all wreck was wholly the king's, and he could not have a small duty of custom out of that which was all his own; and by *Westm.* 1. where wrecked goods belonged more to another than to the king, he shall have it in like manner, that is, as the king hath his:" and *Sheppard v. Gosnold* (b) is cited. Again: "Wrecked goods are not brought into the kingdom being cast on shore, as merchandize, viz. for sale; but are as all other the native goods of the kingdom, indifferent in themselves, for sale or other use at the pleasure of the proprietor." And accordingly, by stat. 52 G. 3. c. 159. s. 1., after reciting that "doubts have arisen whether foreign liquors and tobacco derelict, jetsam, flotsam, lagan or

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(a) Vol. i. p. 392, 393. 10th ed.

(b) *Vaugh.* 159. See p. 164.

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wreck, brought or coming into this kingdom, are by the laws now in force subject and liable to the payment of duties ;" all such liquors, &c., are subjected to the same duties as liquors, &c., of the like kind regularly imported ; and duties have been laid upon wrecked goods by other subsequent enactments. Now, looking to the provisions of stat. 3 & 4 W. 4. c. 52. s. 50., it would seem to have been the object to tax goods coming on shore without the will of the owner, as distinguished from those intentionally brought in as merchandise; but, if that section be construed as the defendant proposes, a duty is exacted only if the goods are wreck in the stricter sense; where property is cast ashore, and an owner appears within the year and day, no duty attaches. This cannot have been contemplated. "Wreck," in sect. 50, is associated with goods derelict; and this term, as appears by the judgment of Sir W. Scott in the Case of *The Aquila* (a), admits the supposition that there may be an owner. Again, sect. 51 enacts "that if any person shall have possession of any such goods," (thus referring directly to the "goods derelict, jetsam, flotsam, and wreck," mentioned in the preceding section), "and shall not give notice thereof to the proper officer of the customs within twenty-four hours after such possession, or shall not on demand pay the duties due thereon, or deliver the same into the custody of the proper officer of the customs, such person shall forfeit" &c.; "and in default of the payment of the duties on such goods within eighteen months from the time when the same were so deposited, the same may be sold" as on like default in the case of goods imported: "pro-

(a) 1 Robinson's Adm. Rep. 37.

vided always, that any lord of the manor having by law just claim to such goods, or if there be no such lord of the manor, then the person having possession of the same, shall be at liberty to retain the same in his own custody, giving bond, with two sufficient sureties, to be approved by the proper officer of the customs, in treble the value of such goods, for the payment of the duties thereon at the end of one year and one day, or to deliver such goods to the proper officer of the customs in the same state and condition as the same were in at the time of taking possession thereof." The year and day here mentioned is the period after which, by the statute *Westminster* 1, 3 *Ed.* 1. c. 4., goods become forfeited by non-claim; and it is clear, on comparing this proviso with the preceding parts of sect. 51, that goods are considered to be the subject of duty as "wreck" and "derelict," as well within as after the year and day. Stat. 52 *G.* 3. c. 159., sects. 1, 2, 3, contained enactments like those of stat. 3 & 4 *W.* 4. c. 52. sects. 50, 51, and subject to the same observation. Stat. 1 & 2 *G.* 4. c. 75. s. 29., which is in *pari materiâ*, speaks of "wreck of the sea or goods" "cast on shore," and of the "owners" of such goods. By the last proviso of stat. 3 & 4 *W.* 4. c. 52. s. 50., if the wrecked goods will not sell for the full amount of duty, the lord of the manor, or other person entitled to receive the same, may have them, at a reduced duty, as unenumerated goods. If this section is limited to goods which have become strictly wreck by forfeiture, the lord, or other person, is relieved, but an owner, if he appears, cannot have the benefit of the proviso.

Secondly, if the right duty has been tendered, and improperly refused, the action lies against this defend-

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missioners could not be sued here, because the collector is noticed by the statute as filling a distinct office, the duties of which have been violated. *Schinotti v. Bumsted* (a) shews that an action lies against a ministerial officer for neglect of duty; and the defendant is such an officer (b).

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T. F. Ellis, contra. First, assuming that the proper duty was tendered, an action does not lie against this defendant; and, indeed, the question being virtually between the owner of these goods and the Crown, the proper remedy for the plaintiff would be, not an action against an officer, but a petition of right. It is a general rule of law that no person, simply as a servant of the Crown, is liable to an action for non-performance of duty; *Gidley v. Lord Palmerston* (c): and it has been so decided even in cases (there cited by *Dallas C. J.*) where the defendant was sued on an express contract; *Macbeath v. Haldimand* (d), *Unwin v. Wolseley* (e). Where, indeed, a positive duty is expressly imposed by statute,

(a) 6 T. R. 646.

(b) *Channell* also mentioned an unreported case of *Beningfield v. Stratford*, tried at Nisi Prius before *Richards C. B.* in 1821, where an importer of tobacco sued the collector of excise for the port of London for refusing to accept the proper excise duty, payable under stat. 29 G. 3. c. 68. on tobacco of the plaintiff then in warehouse, and to sign a certificate according to sect. 52 of that act, to enable plaintiff to obtain delivery of such tobacco. A verdict was there taken for the defendant on some counts, and for the plaintiff on others (one of which stated the breach of duty as above), with 379*l.* damages, subject to a question of law on the liability. No opinion was given by the Lord Chief Baron, and Sir *R. Gifford*, Attorney General, acquiesced in the verdict being taken, with a reservation of the point of law, which, however, was not afterwards brought before the Court. The case being again referred to on the present argument, Lord *Denman C. J.* said that it amounted to nothing, no opinion having been given by the Judge at Nisi Prius, and no motion made in court.

(c) 3 Brod. & B. 275.

(d) 1 T. R. 172.

(e) 1 T. R. 674.

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an action lies; but the defendant, in such a case, is liable, not as a servant of the Crown, but as an individual disobeying the statute; and this explains the decision in *Schinotti v. Bumsted* (a). So in *Lacon v. Hooper* (b) the commissioners of customs were held liable in an action on the case for not making an order on the receiver-general for payment of a premium, which order they were required to make by stat. 26 G. 3. c. 50. and stat. 28 G. 3. c. 20. But, in these cases, the right of action can attach only on breach of a duty directly prescribed by the statute to the party sued. Now here it may be questioned whether the words of stat. 3 & 4 W. 4. c. 52. s. 18., "and such bill being duly signed by the collector and controller, and transmitted to the landing waiter, shall be the warrant to him for the landing or delivering" &c., do constitute a direct order to sign. But, if they do, the question remains, whether such order creates any liability in a person merely appointed by the commissioners of customs to act as their servant. Stat. 3 & 4 W. 4. c. 51. s. 2. empowers the King from time to time to appoint, under the great seal, "any number of persons not exceeding thirteen to be commissioners of his Majesty's customs for the collection and for the management of the customs in and throughout the whole of the United Kingdom;" each commissioner to hold the office during his majesty's pleasure. The commissioners, therefore, are the collectors, by themselves or those whom they employ, and are answerable in law for any misfeasance in that office; a mere servant or deputy cannot be so. If an individual, bound to repair a fence, tells his servant to do it, and the servant will not, the master is still the

(a) 6 T. R. 646.

(b) 6 T. R. 224.

party

party to be sued for such omission. The servant owes no duty to the party suing, but to his master only. [*Coleridge J.* Could a commissioner properly sign the entry under stat. 3 & 4 *W.* 4. c. 52. s. 18. ?] He could; for the preceding act, sect. 2, makes the parties appointed under it commissioners for the "collection" of the customs. And the action was against the commissioners in *Lacon v. Hooper* (a). [*Coleridge J.* The bill of entry is to be signed by the collector "and controller."] A commissioner would sign as collector. The law laid down by *Holt C. J.* in *Lane v. Cotton* (b), as to the liability of a servant, was not there disputed, though the rest of the Court differed from him on the principal point in the case; and his dictum on the subject is still cited as authority, as in 15 *Vin. Abr.* 316. *Master and Servant*, (G), pl. 4. He says: "A servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrong doer. As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by neglect to escape, the sheriff shall be charged for it, and not the bailiff; but if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of wrong-doer, or rescuer; and it will lie against any other that will rescue in like manner." In *Howell v. Batt* (c), which was an action against the keeper of a coach-office for not transmitting to the plaintiff monies received on his behalf at the office, it appeared that the defendant had acted as servant to a third party; and it was scarcely

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(a) 6 *T. R.* 224.(b) 12 *Mod.* 472. See p. 488.(c) 5 *B. & Ad.* 504.

disputed

that "Wreck" "is, where a ship is perished on the sea, and no man escapes alive out of it, and the ship or part of it so perished, or the goods of the ship, come to the land of any lord, the lord shall have that as a wreck of the sea. But if a man, or a dog, or a cat, escape alive, so that the party to whom the goods belong come within a year and a day, and prove the goods to be his, he shall have them again, by provision of the statute of *Westm.* 1. cap. 4." &c. Here the questions of wreck and of forfeiture are treated as identical. To constitute wreck, and to create forfeiture, the non-appearance of an owner is essential. In *Termes de la Ley*, tit. *Jetsam*, it is said that "Jetsam is, when a ship is in danger to be cast away, and to disburthen the ship the mariners cast the goods into the sea: and although afterwards the ship perish, none of those goods called jetsam, flotsam, or lagan, are called wreck; as long as they remain in or upon the sea; but if any of them are driven to land by the sea, there they shall be reputed wreck, and pass by the grant of wreck." Such a grant clearly would not pass goods coming on shore under the circumstances described in this case. *Bracton* says, in *Lib.* 3. c. 3. s. 5. f. 120 a (cited, 2 *Inst.* 166): "Magis propriè dici poterit wreckum, si navis frangatur, et de qua nullus vivus evaserit, et maxime si dominus rerum submersus fuerit, et quicquid inde ad terram venerit erit domini regis," &c. "Et quod hujusmodi dici debeant wreckum verum est, nisi ita sit quod verus dominus aliunde veniens, per certa juditia (a) et signa, docuerit res esse suas, ut si canis vivus inveniatur," &c. "Et eodem modo, si certa signa apposita fuerint mercibus et aliis rebus." And again, *Lib.* 1. c. 12. s. 10. f. 8 a (cited, 2 *Inst.*

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(a) Sic, in ed. 1559. "Indicia" in 2 *Inst.* 166. ed. 1797.

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167.): "Item tempore dicuntur res in nullius bonis esse, ut thesaurus. Item ubi non apparet dominus rei, sicut est de wrecco maris." Lord *Coke* says, in 2 *Inst.* 167, "The cause wherefore originally wreck was given to the crown, stood upon two main maxims of the common law; first, that the property of all goods whatsoever must be in some person. Secondly, that such goods, as no subject can claim any property in, do belong to the king by his prerogative, as treasure trove, strays, wreck of the sea, and others; because of ancient time, when the art of navigation was not so perfect, nor trade of merchandize grown to such perfection, as now it is, it was a matter of great difficulty to be proved, in whom the property of goods wrecked at sea was." This reasoning cannot apply where an owner is forthcoming. In *Hamilton v. Davis* (a), where it was decided that goods cast away in a storm, recently followed, and identified by the owner, were not wreck, though no live animal came to shore, the terms "wreck" and "forfeited as wreck" were treated as convertible, both at the bar and by the Court. It was, indeed, decided, in *The Bailiffs, &c., of Dumbuck v. Sterry* (b), that goods might, for some purposes, be treated as wreck before the year and day expired, and although, at the end of that period, no forfeiture might attach. But that shews only that, before the owner appears, a special property in the goods may be vested another. It is not the less true that, when the owner does appear, the goods are not wreck, and are shewn never have been so. It was argued at the bar, in that case, that "wreck" had two meanings; but the proposition was not made out. The words of Lord *Hale* (*De Jure Maris*, p. 39. Part 1. c. 7.) there cited: "if goods are

(a) 5 *Burr.* 2732.(b) 1 *B. & Ad.* 831.

cast upon the shore" (not "wrecked"), "they may be seized by the king, or the lord that hath the liberty of *wreck*, and lawfully detained, till the right owner come and claim them," shew distinctly that goods cast on shore, where the owner is known, are not wreck; otherwise the proposition would be a truism. The subject is explained consistently with the argument now urged for the defendant, by *Parke J.*, in delivering the judgment of the Court. He says (p. 843.), "If indeed the owner, or his servants or mariners, continue in the possession of the goods to which the misfortune of shipwreck has occurred, such goods are not in any sense "wreck;" for they are not "bona vacantia," and therefore do not belong to the crown or its grantee by virtue of its prerogative." And (p. 845.) he states the opinion of the Court to be, in the case before them, "that the plaintiff had a special property in, and consequent right of action for the taking of, the cask in question: and that it was wreck within the meaning of that term in the law, so as to entitle the grantee to seize it; though it was not "wreck," so as to become finally his absolute property, in which sense that word is used in some of the text writers, and in the statute of *Westminster the First*." That decision is consistent with the principle for which the defendant here contends; for, though there is a property up to the time of the owner's appearance, yet the claim by the owner divests that property, not merely from the time of the claim, but ab initio. If the grantee of wreck had assigned the goods before claim made, the assignee could not hold them afterwards. As *Parke J.* says, in an earlier passage (p. 844.), "if no one is in possession of the goods, the crown or its grantee has a right to the custody;

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custody ; a possessory right, liable to be defeated" (not "transferred") "by the appearance of the true proprietor, and due proof of his title by any mode by which it can be satisfactorily established."

The custom-house acts prior to that in question shew that the legislature has understood the term "wreck" in the sense here contended for by the defendant. Stat. 5 G. 1. c. 11. s. 13. provides for the payment of duties on goods which "shall be salvaged out of any ship or vessel that shall happen to be forced on shore or stranded upon the coasts of this kingdom (*not being wrecked goods, or jetsam, flotsam, or lagan*)."

What goods would those be, which, although stranded, were not wreck? The language must have reference to the criterion, whether or not the goods are so circumstanced as to become forfeit to the lord. Stat. 6 G. 4. c. 107. s. 47. empowers "the owner or salvor of any property liable to the payment of duty saved from sea," and in respect of which salvage shall have been awarded under any law at the time in force, or "paid, or agreed to be paid by the owner thereof or his agent," to the salvors for salvage, to sell so much of the property saved as will defray the salvage awarded or sum paid or agreed to be paid; and that, on proof as there pointed out, the commissioners of customs may allow the sale of such property, free from all duties, to the amount of the sum awarded, paid or agreed to be paid, or such other sum as they shall think reasonable. That clause would comprehend wreck, if the argument for the plaintiff be correct; but that it does not do so is clear from sect. 48, where an inconsistent provision is made for goods "derelict, jetsam, flotsam and wreck;" and the distinction contemplated in these two sections can depend only upon the circumstance

circumstance of the owner being known or not. This is manifest from the whole of the latter section, and particularly from the concluding proviso, "that any lord of the manor having by law just claim to such liquors or tobacco, or if there be no such lord of the manor, then the person having possession of the same, shall be at liberty to retain the same in his own custody, giving bond, with two sufficient sureties, to be approved by the proper officer of the customs, in treble the value of such goods, for the payment of the duties thereon at the end of one year and one day, or to deliver such goods to the proper officer of the customs in the same state and condition as the same were in at the time of taking possession thereof." Neither here, nor in the rest of the section, is any reference made to an owner; and the mention of the lord of manor, and possessor, and of a year and a day, shews that the legislature had in contemplation what is strictly and technically called wreck. Stat. 3 & 4 W. 4. c. 52. s. 49. is in the same words as stat. 6 G. 4. c. 107. s. 47.; then follow sect. 50 (a), on which the present case mainly turns, and other clauses, all inconsistent with the supposition of any person appearing as owner of the goods mentioned in those enactments. Thus, by sect. 50, in case of a question as to the "origin of the goods," (which could not arise where an owner was found) they are to be deemed of the growth, produce, or manufacture of such country or place as the commissioners shall determine; and, by the same section, a mode of fixing allowances for damage is established, differing from that prescribed by sects. 30, 31, 32,

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(a) Antè, p. 648.

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where an importer appears. By sect. 51 (a) the person having "possession of any such goods" as are mentioned in the preceding section is subjected to a penalty if he shall not give notice to the proper officer of the customs within twenty-four hours after such possession, or shall not pay the duties thereon, or deliver the same to the proper officer; but the owner, by stat. 3 & 4 W. 4. c. 56. s. 8., might "warehouse such goods upon the first entry thereof," "without payment of duty upon such first entry." Again, sect. 51 of stat. 3 & 4 W. 4. c. 52., contains a proviso (b) that any lord of the manor having claim to such goods, or, if there be no lord, the person having possession of the same, may retain them in his custody, giving bond for payment of the duties at the end of a year and a day, or to deliver them to the proper officer &c. But where an owner appears, he, as the importer, may warehouse the goods, under stat. 3 & 4 W. 4. c. 56. s. 8., and need not clear them for three years; stat. 3 & 4 W. 4. c. 57. s. 14. Stat. 1 & 2 G. 4. c. 75., cited on the other side, is not in pari materia with stat. 3 & 4 W. 4. c. 52., except on some few incidental points. Sect. 29, which was relied upon as connecting the term "wreck" with a provision in favour of owners, provides for the two distinct cases of stranding and wreck; the owners are evidently mentioned only in connection with the former. The main object of the legislature in stat. 3 & 4 W. 4. c. 52. s. 50. was, to define the duty upon goods not intentionally imported, and of too small value to be followed; and not to provide for the alleviation of duty chargeable upon owners in case of damage; an object already se-

(a) See p. 654, ante.

(b) Antè, p. 655.

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cured by sects. 30, 31, 32; the last of which, it may be observed, disallows any abatement in the case of tobacco.

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Lastly, the tobacco in question was not "goods" "brought or coming (a) into the United Kingdom," within the meaning of stat. 3 & 4 W. 4. c. 52. s. 50. It had, according to the case, been imported and warehoused, and then duly entered for exportation to *Antwerp*, according to stat. 3 & 4 W. 4. c. 57. s. 42. The owner cannot now allege, in contradiction to his own bond, that the goods were coming and being brought into this kingdom when they were taken up as the case describes.

Channell, in reply. The cases cited for the defendant, in which a public servant has been held not liable to an action, were cases of contract, where the defendant had interfered as a known agent, and not as pledging his own credit. But in actions of tort a servant is liable; and *Schinotti v. Bumsted* (b) and *Lacon v. Hooper* (c) are instances of this in the case of public servants. According to the argument for the defendant there would be no remedy in this case; for a mandamus would not lie to the commissioners of customs (d), and if they were sued it might be said that they acted under the controul of the lords of the treasury (e). There must, however, be some mode in which public officers shall be made amenable to the general laws of the country. Then as to the term "wreck." No doubt it includes property of which no owner appears within a

(a) As to the construction of these words, see *Sheppard v. Gosnold*, *Vaugh.* 159, 165, 166.

(b) 6 T. R. 646.

(c) 6 T. R. 324.

(d) *Rex v. The Commissioners of Customs*, 5 A. & E. 380.

(e) Stat. 3 & 4 W. 4. c. 51. s. 3.

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year and a day ; but it has also the more extensive signification relied upon by the plaintiff. *Parke J.*, when delivering the judgment of the Court in *The Bailiffs &c. of Dunwich v. Sterry (a)*, took notice of the passage in 2 *Inst.* 166, 167, but yet held that the lord might have a property in goods wrecked, where they did not remain unclaimed for a year and a day. The right, it is true, was initiatory only ; but it was founded on their being "wreck." The decision in *Hamilton v. Davis (b)* contains nothing to shew that goods, although followed and identified by an owner, may not, for some purposes, be wreck. As to the custom-house acts: stat. 5 *G. 1. c. 11. s. 13.*, cited for the defendant, does not speak of goods forced on shore or stranded, but of goods salved out of any ship that shall be so. The argument for the defendant on stat. 6 *G. 4. c. 107. s. 47.* is, that the goods there mentioned as "saved from sea" are not considered by the legislature as wreck, because of the distinct provision as to duties on wreck, in sect. 48 ; but, from the passing of stat. 52 *G. 3. c. 159.* downwards, there were always enactments in force which would apply to wrecked goods, independently of stat. 6 *G. 4. c. 107. s. 48.* The mention of a year and a day, in sect. 48, and other clauses, does not exclude the supposition of there being an owner, but, on the contrary, suggests that such owner may come forward. The provision in stat. 3 & 4 *W. 4. c. 52. s. 50.*, for deciding on the origin of the goods, may not be quite consistent with this supposition, nor perhaps is it to be expected that every particular enactment should be so ; it is sufficient if some are irreconcilable with any construction but that relied upon by the plaintiff. But

(a) 1 *B. & Ad.* 831.(b) 5 *Burr.* 2732.

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the difficulties raised on this section, and on sect. 51, are obviated by assuming that they include both the case in which there is, and the case in which there is not, an owner found. It is argued that the abatement of duty in case of damage is provided for by sects. 30 and 31; but they apply only to the case of damage during a voyage which has been completed, and the goods voluntarily landed. Stat. 1 & 2 G. 4. c. 75. is, in the particular section which has been referred to, sect. 29, a statute in *pari materiâ* with 3 & 4 W. 4. c. 52. s. 50. As to the last point made for the defendant, the plaintiff insists only that these were not imported goods, but property warehoused and entered for exportation, and afterwards "coming into the United Kingdom" as "wreck" within the meaning of stat. 3 & 4 W. 4. c. 52. s. 50. This is borne out by the statement of the case; and therefore the lower duty attached, and was rightly tendered.

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Cur. adv. vult.

Lord DENMAN C. J., in this vacation (*June 22d*), delivered the judgment of the Court.

Two points were made in this case. The first in importance and order was, whether, assuming that the plaintiff had tendered the proper amount of duty, any action could be maintained against the defendant for refusing to accept it and sign a bill of entry, whereby the plaintiff was prevented from obtaining the delivery of the tobacco in question and selling it to advantage. And we are of opinion that such action is maintainable, although no malice or ill motive is imputed to the defendant. The case states him to be the collector of customs at *Liverpool*, employed as such by the order of

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the commissioners, and "that his duty was to collect the proper amount of duty on each article for which an entry was tendered, and, upon such duty being paid, to sign a bill of entry acknowledging the receipt, which then became a warrant for the delivery of such article from the charge of the proper officers." By stat. 3 & 4 W. 4. c. 51. s. 2., her Majesty is authorised to appoint commissioners for the collection and management of the customs. By sect. 6, the Treasury, or these commissioners under the authority of the Treasury, may appoint proper persons to execute the duties of the several offices necessary to the due management and collection of the customs, and all matters connected therewith, under the control and direction of the commissioners; and, by sect. 7, every person employed on any duty or service relating to the customs, by the orders or with the concurrence of the commissioners, shall be deemed to be the officer of the customs for that duty or service.

Taking the statement in the case and these clauses together, the defendant appears to be not merely the agent and servant of the commissioners, but to be himself a substantive and immediate officer of the crown; and he is charged with the execution of a certain limited duty.

It is true that, in the performance of that duty, he is subject to the controul of the commissioners; but it is still his own duty, not theirs, that he is to perform; the acts which he does are his own acts, not theirs; their control is not an arbitrary one, but limited by the provisions of the statute wherever they apply, and does not absolve him from responsibility to persons affected by the due performance or neglect of his duties.

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The nature of those duties is next to be considered; and, as regards the present question, they are plainly and merely ministerial. He is, according to the statement, to collect the proper amount of duty, and sign the bill of entry. This is not the less a ministerial duty because, in some instances, as in the present, it may not be clear upon the face of the statute what the proper amount of duty may be. Difficulties both of law and fact arise repeatedly to ministerial functionaries, such as the sheriff, in the discharge of his duties; but these do not alter their nature.

The defendant, then, is a public ministerial officer, and, being so, he is responsible for neglect of his duty to any individual who sustains damage by such neglect. *Schinotti v. Bumsted* (a) is a strong authority to this effect, the facts in that case respecting the commissioners of the lottery tending much more to raise a doubt whether the defendants had not a judicial discretion entrusted to them; and in *Lacon v. Hooper* (b), which was an action against the commissioners of customs for not making a certain order for the payment of money to which the plaintiffs claimed to be entitled under an act for the encouragement of the *South Sea* whale fishery, it was not questioned but that even they would be liable to the action, if the neglect of duty were made out.

We pass on, therefore, to the second question, whether, under the circumstances stated in the case, the tobacco in question is to be considered wreck within the fiftieth section of stat. 3 & 4 W. 4. c. 52. It is conceded by the plaintiff that, if the word "wreck" in

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(a) 6 T. R. 646.

(b) 6 T. R. 224.

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that clause be confined to that only which would pass to the crown or the crown's grantee under the prerogative or franchise of wreck, these goods do not fall within that predicament; but it is contended by him that the word is not to be construed in so limited a sense; and we are of opinion that, according to established rules of construction, it ought not to be so construed. The section, in its enacting part, professes to extend to all "foreign goods, derelict, jetsam, flotsam, and wreck, brought or coming into the United Kingdom;" and, without reference to their condition or value, subjects them to the same duties as imported goods of the same kind. If the section had stopped here, it would have been difficult to say that these goods were *imported* goods, for they were in the act of *exportation*: the owners had done nothing except with a view to exportation. Against their will, by the violence of the storm, they were separated from the vessel in which they were placed, and from the charge of those to whose custody they were intrusted, and either cast on shore, or, being found floating, carried thither: if imported, by whom could they have been said to be imported? But, if not imported, were they liable to *no* duty? Would it not then have been reasonably urged that they fell within the very words and intent of the enactment, and became subject, *as wreck*, to the same duty as if they had been imported?

If so, we must necessarily apply the same rule of construction to the proviso at the end of the section to *relieve* them, as we should have done to the enacting part to charge them. The word "*wreck*," no doubt, in both parts comprehends goods which strictly and technically speaking are "*wreck*;" but, as it is capable also
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of a larger sense, and as in both parts the object of the section can only be fully obtained by giving it that larger sense, we ought so to understand it. We are additionally led to this by considering that the term of contrast to the word "wreck" is not goods unforfeited, or goods whereof the owner is known, but goods imported, as if the distinction present to the minds of those who framed it was, not between goods subject and goods not subject to a franchise, but between goods arriving in the regular course of importation and those coming by the casualties of the seas and storms; and accordingly, by the proviso, they are to be delivered over to the lord of the manor, or (using the most general words) "other person entitled to receive the same."

Upon both grounds, therefore, we think the plaintiff entitled to maintain the action, and to our judgment according to the terms provided in the special case.

Judgment for the plaintiff.

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HOLMES *against* CLIFTON, Esquire.

Friday,
June 21st.

CASE against the sheriff of *Lancashire*, for not levying under a *fi. fa.*, duly indorsed with a direction to levy of the goods of *L. M.* 110*l.* for debt, and 4*l.* for costs; and falsely returning that he had levied 160*l.* and retained 6*l.* 10*s.* for poundage and expences, and had the residue 153*l.* 10*s.* ready to render to plaintiff in part satisfaction of his debt &c.; and that the said *L. M.* had no more goods in his bailiwick, whereof the rest of the debt could be levied.

Where the sheriff on a *fi. fa.* returns that he has levied part of the debt, and that the debtor has no goods whereof the residue can be levied; and the creditor accepts the amount levied on account, and towards payment, of his debt; he

is not thereby precluded from bringing an action against the sheriff for a false return.

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Plea,

Per Curiam (a). The case of *Beynon v. Garrat (b)*, if correctly reported, cannot be maintained. It might as well be argued that a creditor, who accepts part of his debt, is precluded from recovering the rest.

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S. Judgment for the plaintiff.

(a) Lord Denman C. J., Patteson and Williams Js. Littledale J. was absent.

(b) 1 C. & P. 154.

KING against BRADDON.

Friday,
June 21st.

ASSUMPSIT by first indorsee against acceptor of a bill of exchange for payment of 106*l.* 1*s.* 6*d.*, three months after date thereof (20th June 1838).

Plea, that, before making the bill, defendant was indebted to plaintiff in 120*l.* 16*s.* on an account stated; and that it was corruptly agreed by and between plaintiff, defendant, and the drawer, that defendant should pay to plaintiff the sum of 14*l.* 14*s.* 6*d.* in reduction of the debt; and that plaintiff should forbear and give day of payment of the residue, viz. 106*l.* 1*s.* 6*d.*, to defendant for the space of three months; and that, for such forbearance, defendant should pay to plaintiff 5*l.* 5*s.* 6*d.*, and the said bill should be made, accepted, and indorsed to plaintiff as a security for payment of the said residue at the end of three months. Averment of payment to plaintiff of the several sums of 14*l.* 14*s.* 6*d.* and 5*l.* 5*s.* 6*d.*, in pursuance of the corrupt agreement; and of the making, acceptance, indorsement, and receipt of the bill by the plaintiff as such security as afore-

To an action by indorsee against acceptor of a bill of exchange, payable three months after date, it is no defence (since 3 & 4 W. 4. c. 98. s. 7., and 7 W. 4. & 1 Vict. c. 80.) that, defendant being indebted to plaintiff on an account stated, it was agreed between plaintiff, drawer, and defendant, that plaintiff should forbear payment of the debt for three months; that defendant should pay to plaintiff a certain sum larger than interest at 5 per cent. per annum for such forbearance; that the bill

should be made, accepted, and indorsed to plaintiff as a security for payment of the debt at the end of three months; and that the said sum was in fact paid by defendant, and the bill made, accepted, and indorsed to plaintiff, in pursuance of such agreement.

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said, in further pursuance, &c.; and that the sum of 5*l.* 5*s.* 6*d.*, so paid, exceeded the rate of 5 per cent. &c.; by means whereof, and by force of the statute, the bill was wholly void. Verification.

Demurrer (assigning special causes of demurrer not noticed in the argument). Joinder.

R. V. Richards for the plaintiff. The plea is no defence since the stats. of 3 & 4 *W. 4. c. 98. s. 7.* and 7 *W. 4. & 1 Vict. c. 80. (a).* They provide in general

(a) The words of 3 & 4 *W. 4. c. 98. s. 7.* are, "No bill of exchange or promissory note, made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void, nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury, nor shall any person or persons drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in *Great Britain* and *Ireland* respectively, for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalties or forfeiture; any thing in any law or statute relating to usury in any part of the United Kingdom to the contrary notwithstanding."

The above provision is extended by 7 *W. 4. & 1 Vict. c. 80.*, which enacts "That from and after the passing of this act, and till *January 1st*, 1840, no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive, or allow interest in discounting, negotiating, or transferring the same, be void, nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, or body corporate, drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in *Great Britain* and *Ireland* respectively for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture; any thing in any law or statute relating to usury, or any other law whatsoever in force in any part of the United Kingdom, to the contrary notwithstanding."

terms

terms that the liability of a party to any bill of exchange shall not be affected by reason of any statute or law in force for the prevention of usury. The case is clear of the question made in *Vallance v. Siddel* (a).

1839.

KING
against
BRADDON.

Busby, contra. The plea is good. That an instrument, made for the purpose of giving effect to a corrupt bargain, was void before the late statutes, is clear from *Roberts v. Trenayne* (b), and *Morse v. Wilson* (c). The only question is, whether the bill is protected by those statutes. The word "such" must be supplied between the words "any" and "bill" in both statutes. The intention of the legislature sufficiently appears from the insertion of that word before the word "bill," in the latter part of the clause in both acts. Indeed the second act was not necessary, if the first had the effect of repealing stat. 12 *Ann. st. 2. c. 16*. Then are the late acts applicable to a case where the usury is not confined to the bill itself, but affects the very transaction in which the bill originated, and which it was intended to cover? In *Berrington v. Collis* (d) the Court, in giving judgment, say, that the acts contemplate the case of interest taken on, or secured by, a bill "as the real and bonâ fide ground of the debt"; and do not extend "to the case of a bill of exchange, or promissory note, given in addition to a security of another nature not protected by the statute, upon which the debt was really contracted." Here there was a previous debt found due upon an account stated, upon which usurious interest was agreed to be paid. The bill itself did not bear illegal interest, but was given to secure the

(a) 6 *A. & E.* 932.(b) *Cro. Jac.* 507.(c) 4 *T. R.* 353.(d) 5 *New Ca.* 332.

performance

1839.

—
KING
against
BRADDON.

performance of this previous bargain, which is not itself made legal by any act. If a bill or note given for such a purpose be valid, it will be easy to elude the laws against usury in every case.

R. V. Richards, in reply. The word "such" may be inserted in this part of the section without injury to the plaintiff's demand; for the bill is payable at three, or within twelve, months after date, and therefore protected by either statute. In *Berrington v. Collis* (a) the loan was really on security of a lease and a warrant of attorney, and the application was to set aside judgment entered up on the latter. If the loan had been on the security of the note alone, the decision would have been different; *Connop v. Meaks* (b).

LORD DENMAN C. J. We cannot take the case out of the protection of the statutes. The bill is made payable at three months after the date, or has not more than three months to run. This is all that the stat. 3 & 4 W. 4. c. 98. s. 7. requires to exempt it from the operation of the usury laws.

PATTESON (c) and WILLIAMS Js. concurred.

S.

Judgment for the plaintiff (d).

(a) 5 New Ca. 332.

(b) 2 A. & E. 326.

(c) *Littledale J.* was absent.

(d) See *Holt v. Miers*, 5 M. & W. 168.; and stat. 2 & 3 Vict. c. 37., continued by 3 & 4 Vict. c. 83.

1839.

The QUEEN *against* The Inhabitants of BLACK Saturday,
June 22d.
CALLERTON.

ON appeal against an order of justices removing *Hannah Hope*, widow, and her two children, from the township of *Quarrington* in the county of *Durham*, to the township of *Black Callerton* in the county of *Northumberland*, the sessions confirmed the order, subject to the opinion of this Court upon a special case.

On appeal against an order of removal, it is a good objection, that the copy of examination, sent to the appellants under stat. 4 & 5 W. 4. c. 76. s. 79., does not shew that the pauper was chargeable.

The case stated an agreement by which *Andrew Hope*, afterwards the husband of the pauper *Hannah*, was hired to work in a colliery, and under which he served for the stipulated period, residing in *Black Callerton*. After some details as to the service under this contract, the case proceeded as follows.

The said *Andrew Hope* subsequently married and died; and, on 10th *February* 1838, an order in the usual form was made (stating the above order of removal). A notice in writing of chargeability, and a copy of the order of removal, were served upon the overseer of *Black Callerton*, and likewise copies of the examinations taken before the removing justices; but such examinations did not contain any statement or proof that the said pauper and her children were then chargeable to, or had been relieved by, the township of *Quarrington*. The township of *Black Callerton* appealed against the order, and stated in their notice two grounds of appeal.

1. That *Andrew Hope* never gained a settlement in the appellant

ave been sent," as there directed. That does not require that the chargeability shall appear by the examination; the notice gives information of that fact, and would be superfluous if the examination were necessary to show it. The material facts in an examination are those which concern the settlement, and so bear upon the grounds of removal. The complaint of chargeability, and the examination with a view to removal, are different proceedings: the one may be heard by a single justice, without oath; the other is taken on oath, by two justices. It would be hard that the respondents should suffer by the neglect of those taking the examination to advert to a particular fact. It was the opinion of this Court, in *Ex v. Kelvedon* (a), that an examination may be treated with less strictness than a notice of appeal, because the respondents, in an examination, do not use their own language. They cannot control the proceeding of the magistrates. No one could have been misled here; and that argument, in favour of an examination, was used by Lord Denman C. J., in *Regina v. Church Knowle* (b). The arguments as to the hiring are omitted.)

Cresswell and *Granger*, contra, were stopped by the Court.

LORD DENMAN C. J. The preliminary objection is not to be got over. If we do not require that the chargeability shall appear on the examination, we shall give occasion to speculative removals.

PATTESON J. (c). It is argued that the statute requires only three things to be sent before the pauper is re-

(a) 5 A. & E. 687.

(b) 7 A. & E. 471.

(c) *Littledale J.* was absent.

1839.

THE QUEEN
against
The Inhabit-
ants of
BLACK
CALLETON.

movable;

parish of *Ticehurst*, in the aforesaid county of *Sussex*, by having, in or about the year 1830, paid parochial taxes for and in respect of a certain tenement in the aforesaid parish of *Ticehurst*, rented by the said *H. G.*, at the sum of 15*l.* a year, for the term of one whole year, and occupied by him under such hiring for more than the said term of one year; the rent for the same, to the amount of 10*l.*, having been paid by the said *H. G.*:" "Thirdly, by having rented the aforesaid tenement in the said parish of *Ticehurst* at the sum of 15*l.* a year, and having occupied the same under such hiring for more than the term of one year, and having paid rent to the amount of 10*l.* for the same tenement." The appeal was called on for hearing at the *Lewes* quarter sessions, *April* 1839, when the respondents' counsel objected to its being heard, because the grounds were not sufficiently set forth in the notice, inasmuch as the appellants had neglected to mention therein the name of the person or landlord of whom *H. G.* hired and rented the premises alluded to in the second ground of appeal; and inasmuch as such notice did not otherwise sufficiently describe and fix dates or times when such premises were so rented or occupied by the *appellant*. On the first objection, the omission of the landlord's name, the sessions refused to hear the appeal, and confirmed the order of removal. In *Trinity Term*, 1839, a rule nisi was obtained for a mandamus to the justices to enter continuances and hear the appeal.

[1840.]

**The QUEEN
against
The Justices of
the Eastern
Division of
SUSSEX.**

Tyndale now shewed cause. The notice ought
least to have stated the landlord's name; or, if not,
= situation of the house, or some other particular
VOL. X. Z z from

[1840.] from which the respondents could ascertain the facts material to their case; *Rex v. The Justices of Derbyshire* (a).
 The QUEEN
 against
 The Justices of
 the Eastern
 Division of
 SUSSEX.

Petersdorff, contra, was called upon by the Court. The two facts stated, that the pauper rented a tenement in the parish, and paid parochial taxes for it, are sufficient for the purpose suggested. The respondents, being furnished with these, might obtain the necessary information from the parish officers. [Lord *Denman* C.J. The pauper's name might appear on the rate books in respect of different tenements. The notice ought to have shewn distinctly what settlement the appellants meant to prove. They must have known; why should not they tell the opposite party?] Too great particularity would be inconvenient, because a slight variance might defeat the appeal. [Lord *Denman* C.J. Is there any inconvenience in shewing the local situation?] That might be difficult in a country parish. Giving the name of the landlord would not secure the information required: changes might have occurred, by death or otherwise. [Lord *Denman* C. J. The subject of inquiry would be, of whom the pauper hired.] The payment of parochial taxes affords guidance enough for any necessary inquiry.

LORD DENMAN C. J. I do not mean to say that the local situation of premises must necessarily be specified, because that may be difficult; though in a large parish it ought to be ascertained as nearly as possible. But at any rate the landlord's name should be given. This notice was insufficient.

(a) 6 A. & E. 885.

LITTLEDALE

LITLEDALE J. The landlord ought to have been described; I do not say by his Christian name, but at any rate by his surname. [1840.]

The QUEEN
against
Justices of
the Eastern
Division of
SUSSEX.

COLERIDGE J. (a). Ascertaining the situation of the premises might be more or less difficult, according to the nature of the parish. In an agricultural parish, for instance, there might be a good deal of difficulty; but, there, naming the landlord would be the best way of fixing the property.

Rule discharged (b).

(a) *Williams J.* was on the special commission at *Monmouth*.

(b) See the next case.

The QUEEN against The Justices of the West Riding of YORKSHIRE. [Friday, May 29th. 1840.]

(CLINTON against BIRSTWITH.)

AT the Summer sessions for the West Riding of Yorkshire, 1839, an appeal came on to be heard against an order removing *John Lax*, his wife and children, from the township of *Birstwith* to the township of *Clint*, both in the West Riding. The alleged settlement in *Clint* was by occupation of a tenement there. On the evidence of the pauper at sessions, it appeared that he entered on the occupation of the tenement a year later than the year stated in that behalf in his examination before the justices. Upon this the Court stopped the hearing and discharged the order.

Where the pauper's examination differs from his evidence at sessions, as to any circumstance making a part of the matter pointed to in the statement of grounds of appeal, it is for the sessions to decide whether the variance be material within stat. 4 & 5 W. 4. c. 76. s. 81.

So held, on application for a mandamus to enter continuances and hear an appeal.

Per Lord Denman C. J. The examination of the pauper is to be construed as strictly as the statement of grounds of appeal.

as to variances must be that they tend to mislead, or affect the merits. Here the variance could not mislead; which takes the case out of the principle upon which, if at all, *Ex parte Broseley* (a) must be supported. And the only question on the merits is, whether the pauper occupied a tenement so as to gain a settlement: not whether he occupied it in one year or another. In *Rex v. Kelvedon* (b) *Coleridge J.* appears to have thought that a mere statement of the fact of settlement in the appellant parish would suffice, and the Court seem to have considered that the examination was to be interpreted less strictly than the grounds of appeal. If the rule is to be strict, a variance of one day would be fatal; but that cannot be held. Then, as to the second point, the Court will enquire whether the sessions have rightly decided a matter preliminary to their enquiry into the merits; and the decision of the sessions here has no relation to the merits. *Rex v. Frieston* (c), *Rex v. The Justices of Cumberland* (d), are in point. In the latter case, the sessions had commenced the enquiry into the merits; but decided ultimately on a preliminary point.

[1840.]

The QUEEN
against
The Justices of
the West
Riding of
YORKSHIRE.

LORD DENMAN C. J. I think that we are not precluded from entering into an inquiry whether the sessions have decided rightly upon any preliminary point of practice necessary to determine their own jurisdiction. In this case, however, the decision is on a question which may often raise great difficulties either at the sessions or here. Mr. *Merivale* contends that a different degree of strictness must be applied to the pauper's examination and the statement of objections.

(a) 7 A. & E. 423.

(b) 5 A. & E. 687. See pp. 690, 691.

(c) 5 B. & Ad. 597.

(d) 4 A. & E. 695.

Middleton in *Teesdale*, in the same county, the sessions confirmed the order, subject to the opinion of this Court upon a case, the material parts of which were as follows.

[1840.]

The QUEEN
against
The Inhabit-
ants of
MIDDLETON
in TEESDALE.

The removal was made upon the examination of the pauper alone, which stated "that she is nineteen years of age, and that her father gained a settlement in the township of *Middleton* in *Teesdale*, in the said county, by renting and occupying a house and land of one *Jacob Tarn*, in the said township of *Middleton* in *Teesdale*, of the yearly rent of 10*l.*" (The rest of the examination related to the pauper herself, and is not material.) Copies of the examination, order of removal, and notice of chargeability, were duly served. Notice of appeal and the grounds of appeal were also duly served. The grounds of appeal were stated as follows:

1. "That the order, the examination upon which the same is grounded, as also the notice of chargeability accompanying the same, are bad upon the faces thereof."
2. "That the lawful settlement of the said *Elizabeth Collinson*" "is not in our township of *Middleton* in *Teesdale*, as represented in the said order, but, on the contrary, is in your township of *Newbiggin* (she not having gained a settlement in her own right), her father having gained a settlement there by renting a tenement of the value of 10*l.* or more, in the years 1816, 1817, 1818, and 1819, or some or one of them, and resided there during the time."
3. "That the said *Matthew Collinson*" (the father) "also gained a settlement in your said township of *Newbiggin*, by again renting a tenement therein in the years 1829, 1830, and 1831, or some or one of them, and paid rent for the same to the amount of 10*l.* for the year." On the hearing of the appeal,

[1840.]

The QUEEN
against
The Inhabit-
ants of
MIDDLETON
in TRESDALE.

the respondents insisted that the settlement of the pauper, as set forth in her examination, was admitted by the appellants, as their notice did not, in the first ground, specify any defect in the examination, and was therefore inoperative; and did not, in the second or third ground, deny the settlement alleged in the examination; and that the appellants ought not to be allowed to give evidence of the settlement stated in either the second or third ground of their appeal, as the allegation was defective in not sufficiently describing the tenement, there not being any statement either of the nature of the tenement, or of whom it was held. The sessions, being of this opinion, confirmed the order of removal, subject to the opinion of the Court of Queen's Bench. If this Court should be of opinion, either that the respondents ought to have proved their case by evidence, or that the appellants ought to have been admitted to contest the validity of the order, examination, and notice of chargeability, or to give evidence of the settlement alleged in the second or third ground of their appeal, the appeal was to be reheard. If this Court should, on both points, be of the contrary opinion, the order of sessions to be confirmed.

Ingham, in support of the order of sessions. The appellants could not avail themselves of the alleged settlement of *Matthew Collinson*, because it is too vaguely stated in the notice of appeal; *Rex v. The Justices of the Eastern Division of Sussex (a)*. (*Wilkinson*, contra, admitted this.) Then the first ground of appeal is insufficient, being also too vague to apprise the respondents

(a) *Antè*, p. 682.

of the answer relied upon by the appellants. Objections, even on the face of the order of removal, must be pointed out by the notice of appeal; *Rex v. Withernwick* (a); which is supported, in principle, by *Regina v. Hockworthy* (b). [Lord Denman C. J. The objection here is, that the justices have removed the pauper, no settlement in the appellant parish appearing.] That objection is not specified. It would be very dangerous to admit such a general form of notice. A clerical error, of 1*l.* for 10*l.*, might be meant. Respondents should have such information as will enable them to take advice whether they shall maintain or abandon their order. Parish officers cannot be expected to know every defect on the face of an order or examination which might be taken advantage of on such a notice as this. Not only is the notice here too vague, but it tends to mislead, for it seems to point out some objection common to the order, examination, and notice of chargeability.

[1840.]

The QUEEN
against
The Inhabit-
ants of
MIDDLETON
in TEESDALE.

Wilkinson, contra, was stopped by the Court.

LORD DENMAN C. J. The appellants say that this examination is bad on its face; and the question is whether it be so, not formally, but for want of any ground for the jurisdiction of the justices. I think it is bad on that account. The examination does not shew a renting by the pauper's father for any specified time. The respondents, on notice of appeal, should have given their attention to this, and seen whether they could remedy the error. I think that *Rex v.*

(a) 6 A. & E. 273.

(b) 7 A. & E. 492. See p. 496.

[1841.]

he two following cases were decided in *Hilary* term,
1841.

The QUEEN *against* The Inhabitants of
BRIDGEWATER.

[*Wednesday,*
January 20th,
1841.]

AN appeal against an order of justices, removing
Henry Channon and his family from the parish of
Bridgewater to the parish of *Compton Bishop*, both in
county of *Somerset*, the sessions quashed the order,
subject to the opinion of this Court on a special case, in
instance as follows.

The appeal came on to be heard at the *Wells Lent*
sessions, 1840. Notice of appeal had been given,
saying, as the grounds, "That the said *Henry Channon*,
father, has never been maintained by our said parish
Compton Bishop, but that the said *Henry Channon*,
father, has resided in and obtained a settlement in
our said parish of *Bridgewater* by servitude therein,
said *Henry Channon*, the father, having been the
wed servant of *Charles Knight* of *Bridgewater* afore-
said, sheriff's officer, for a period exceeding one year,
and has not, since such servitude, obtained a settlement
in our said parish; and that the said *Henry Channon*,
father, was, by such service as aforesaid, and now is,
fully settled in the said parish of *Bridgewater*."

On the trial of the appeal, the respondents objected
that the notice was insufficient, "for not stating the
date of the service of the pauper with *Charles Knight*."
The Court were of opinion that the objection was
invalid, but proceeded to try the case upon the merits,

In a notice of
appeal under
stat. 4 & 5
W. 4. c. 76.
s. 81., against
an order of
removal, alleg-
ing, as the
ground of ap-
peal, a settle-
ment by hiring
and service, the
general rule
is, that the date
of the service,
as well as the
master's name,
should be
stated; and that
a notice omit-
ting such date
is bad. If it ap-
pear that the ap-
pellants could
not ascertain it,
semble, per
Lord Denman
C. J. and Lit-
tledale J., that
the strict rule
may be dis-
penssed with.

Per Lord
Denman C. J.
and Coleridge
J.; the sessions
may judge whe-
ther, under the
circumstances
of any particu-
lar case, time is
so material that
the omission
to specify it
vitiaties an exa-
mination or no-
tice of appeal.

and

[1841.]

—
 The QUEEN
 against
 The Inhabit-
 ants of
 BRIDGEWATER.

and decided that the pauper gained a settlement in *Bridgewater* by hiring and service for fifteen months in 1825 and 1826; and the order was quashed, subject to the opinion of this Court as to the sufficiency of the notice of appeal on the above point. If the Court should be of opinion that the grounds of appeal were sufficiently stated, according to stat. 4 & 5 W. 4. c. 76. s. 81., the order of removal to be quashed; otherwise to be confirmed.

Cockburn and *T. W. Saunders* in support of the order of sessions. The whole objection to this notice is, that the date of the service is not stated. But, if a notice states the cause of appeal, it is not necessary to set forth all the circumstances of the appellants' case. *Rex v. The Justices of Derbyshire (a)* may be cited on the other side; but there the observation of *Littledale J.* in delivering judgment was, that "without being informed of the time of service or the name of the master, the respondents would in vain make inquiries in any populous parish as to the fact of the pauper having been hired and served in it." Here "the name of the master" is stated. The only object of stat. 4 & 5 W. 4. c. 76. s. 81. is, that the respondents may have such information as may enable them to contest the appeal on the merits; here that is furnished: it was not so in *Rex v. The Justices of Derbyshire (a)*, or in *Regina v. The Justices of the Eastern Division of Sussex (b)*, where the notice was held insufficient. It appears to be now settled that the same rule of strictness applies to a notice of

(a) 6 A. & E. 885.

(b) *Antè*, p. 682.

appeal and to an examination furnished under sect. 79.; but an examination which stated a hiring and service to *A. B.* would be circumstantial enough, though it did not give a date. An aged person might not be able to fix the period of the service; yet, if the justices believed his statement, they would be bound to act upon his examination. The notice, by sect. 81, is to state the grounds of appeal; the time of service is no essential part of the grounds. [*Coleridge J.* The same may be said of the place, and so that might be omitted.] The place might be material, for the purpose of shewing that it was not extra-parochial. [*Coleridge J.* Time might be equally material; as for the purpose of shewing that the pauper was unmarried when hired. The object of notice is to give some available information to the respondents. Suppose, in stating the place, you merely mentioned *Newton*, which is the name of many places in *England*.] If the time or place were a material circumstance, it ought to be stated particularly; but that is not so in every case. The degree of minuteness necessary will vary with circumstances: in one parish more will be requisite, in another less; and of this the sessions must judge, as was held in *Regina v. The Justices of the West Riding (Clinton v. Birstwith)* (a). No general proposition can be laid down on the subject. [*Coleridge J.* If that be so, have not the sessions here given judgment against you?] They resolved this point as a question of law, without reference to the particular facts. If they have acted erroneously, the Court will, at most, only send the case back to them, not quash their order.

[1841.]

—
The QUEEN
against
The Inhabit-
ants of
BRIDGEWATER.

(a) *Antè*, p. 685.

Kinglake,

[1841.]

—
The QUEEN
against
The Inhabit-
ants of
BRIDGEWATER.

Kinglake, contra. In *Regina v. The Justices of the West Riding* (a) Lord Denman C. J. said that there was no difference, as to strictness in the construction, between an examination and a statement of grounds of appeal. [Lord Denman C. J. That was not a special case, but an application for a mandamus; and we thought that the sessions were bound to exercise their own judgment as to the sufficiency of the matter stated. I think that, in every case, each party is bound to tell the other all he knows. The knowledge may be different on one side and the other. The respondent discloses his case by the examinations; then comes the appellant and states his ground of objection; if in doing so he fails to specify time, the question arises whether time is material in the case.] In *Regina v. Middleton in Teesdale* (b) an examination shewing a settlement by renting a tenement was held defective, because it specified no time, though the landlord's name was mentioned. [Coleridge J. There the time might be material on account of the several statutes altering the law as to this head of settlement.] It would be equally material here, because stat. 4 & 5 W. 4. c. 76. s. 64. enacts that "from and after the passing of this act no settlement shall be acquired by hiring and service, or by residence under the same." [He was then stopped by the Court.]

LORD DENMAN C. J. I think that it is necessary, in a notice of this kind, to state the time, as far as the parties know it. They may not know it, and that case

(a) *Antè*, p. 685.(b) *Antè*, p. 688.

may

may require to be considered differently from others. [1841.]
 But it would be very dangerous if it were held generally
 sufficient to give a notice as vague as that the party
 served *John Smith*, in *Marylebone*.

The QUEEN
 against
 The Inhabit-
 ants of
 BRIDGEWATER.

LITLEDALE J. This case, like *Rex v. The Justices of Derbyshire (a)*, is not free from difficulty; but the time, in a notice like this, is almost as essential as the name. The service may have taken place thirty years ago; and the supposed master may have left the place or be dead: but, if the date is fixed, the respondents may perhaps be enabled to shew that the pauper was not in the place, or that he was in some other place, at the time in question. There may be an inconvenience in requiring these particulars; but on the whole I think it is best that both time and name should be given. In some cases it may be impossible; but that may be a reason for dispensing with the strict rule in the particular case.

PATTESON J. I think both statements should be given. Where they are withheld, I suspect it is generally an intentional omission.

COLERIDGE J. It is against all the authorities to say that a mere statement of the legal ground of appeal, without the circumstances, is sufficient. We must construe sect. 81 with reference to the proviso which limits the evidence, on the hearing of an appeal, to those "grounds of removal, or of appeal," which shall have

(a) 6 A. & E. 885.

been

[1841.]

The QUEEN
against
The Inhabit-
ants of
BRIDGEWATER.

been "set forth in such respective order, examination, or statement as aforesaid." This seems to shew an intention that the kind of case relied upon should be stated, so as to give the opposite party a power of meeting it on the merits. I doubted at first whether the information here furnished was not sufficient: but, if we are to lay down a general rule, I should say that there ought to be strict good faith, and full information given: and, as the omission to fix a time would often leave the opposite party no means of meeting the case, that the statement should specify time. Still I think that in many cases the sessions would do well to constitute themselves judges of the requisite particularity, and, if they thought that, in the instance before them, information enough had been given, decide the point of law accordingly.

Order of sessions quashed (a).

(a) See the next case.

Also, as to the particularity requisite in a notice of grounds of appeal, *Regina v. Whitley Upper*, 11 A. & E. 90.

[1841.]

The QUEEN *against* The Inhabitants of
 ALTERNUN. [Wednesday,
 January 27th,
 1841.]

ON appeal against an order of two justices removing *Catherine Bray, Charles Bray, &c.*, from the parish of *Gwennap* in the county of *Cornwall*, to the parish of *Alternun* in the same county, the sessions confirmed the order, subject to the opinion of this Court upon appeal, in substance as follows.

Catherine Bray, Charles Bray, &c., children of *Thomas Bray*, were removed as above stated. The order of removal was dated on *January 2d*, 1840, and the notice of chargeability on the 8th of that month. Besides the examination which related to the chargeability, the only examination which accompanied the order, and related to the settlement, was the examination of *Thomas Bray*, the father, which was dated *January 1st*, 1840, and who is described in the examination as a prisoner in the goal at *Bodmin*. Eight grounds of appeal were then set forth in the case, as having been stated by the appellants in their notice of appeal. The first three controverted the acquiring of a settlement in *Alternun*, alleged by the respondents; the fourth and fifth set out later settlements elsewhere; the sixth turned upon a want of certainty in the examination of *Bray* as to the ages of the children; the seventh alleged a want of certainty in the same examination as to the time and manner of acquiring a settlement in *Alternun*. The

The copy of examinations, transmitted with an order of removal, under stat. 4 & 5 W. 4. c. 76. s. 79., must shew, on the face of it, every fact necessary to give the justices jurisdiction to remove.

Where the examination shews all such particulars, and discloses no irregularity, it cannot be objected, on appeal, that the evidence was in fact inadmissible, if the objection was not made known to the justices at the examination.

Where an order of removal had been made upon the examination, regular on the face of it, of *T. B.*, which was transmitted according to stat. 4 & 5 W. 4. c. 76. s. 79., and, on appeal, the ap-

pellants offered to prove that *T. B.*, when examined, was a convicted felon: Held, that such evidence was irrelevant if offered as impeaching the examination.

Sir *W. W. Follett* and *M. Smith* in support of the order of sessions. The objection relied upon is not, on any ground, relevant to the enquiry before the sessions. The question there was, whether the pauper was settled and the order good: it could not be material to the decision on those points, whether the magistrates acted rightly or not in taking the examination. The only provision as to examinations, in stat. 4 & 5 *W. 4. c. 76.*, is sect. 79; and that lays down no rule as to the manner in which they shall be taken, or the consequences of taking them improperly. [*Coleridge J.* Suppose the examination had appeared not to be upon oath.] That is not the present case. It does not appear that the magistrates taking the examinations knew that *Bray* was a convicted felon. [*Patteson J.* The examination is not placed on the footing of evidence by the statute. If, indeed, the convict were offered as a witness at the sessions, an objection would arise, which is not raised here.] The examination is to be used, not as evidence, but as a piece of pleading to inform the opposite party what grounds of removal are insisted upon. The witnesses examined by the magistrates need not be called at the sessions. If *Bray* had been called at the sessions, it would have been time enough then to take any objection to his competency. The two examining justices are not to hunt out records of conviction. [*Coleridge J.* Suppose it had appeared that the whole evidence had been hearsay.] It is not clear that that would have been an objection. Hearsay evidence is constantly admitted in these examinations, though it would not be received at the sessions: great expence would be occasioned by excluding it on the preliminary investigation. The argu-

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good on appeal; *Rex v. Coln St. Aldwin's* (a). In the present case it is evident from the dates that *Bray* was a convicted felon at the time of the examination. In *Rex v. The Justices of Norfolk* (b) an order of removal was abandoned, because liable to the same objection. [Lord *Denman* C. J. I do not think that case has much bearing on the present. It turned principally on another point. And the order seems to have been abandoned because the parties could not have supported it at sessions.] Whether an order has been made without evidence, or on the evidence of a witness who is incompetent, the objection may be taken on the appeal.

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LORD DENMAN C. J. My impression at first was opposite to the opinion I now entertain. I think the two justices were bound to take the prisoner's examination, unless it was brought to their knowledge that he was a felon convict. Whether he actually was convicted when the examination was taken, we do not know, though he appears to have been so by relation of the time of conviction to the first day of the sessions. Our decision, that the justices were bound to take this examination unless they knew at the time that *Bray* was a felon convict, is not at variance with the cases. In *Regina v. Black Callerton* (c) the fact of chargeability was omitted in the examinations. In *Regina v. Middleton in Teesdale* (d) the examination shewed no settlement whatever; therefore there was an evident want of jurisdiction. Parties interested in the order have a right to call upon the justices to make every thing which gives them jurisdiction appear on the examinations. Here

(a) *Burr. S. C.* 136.(b) 5 *B. & Ald.* 484.(c) *Antè*, p. 679.(d) *Antè*, p. 688.

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they did so as far as they knew. The evidence stated was evidence which they were bound to receive: the objection to it would arise at the sessions, if there tendered. *Rex v. The Justices of Norfolk (a)* shows how the case would stand in this respect. The justices appear to have had jurisdiction; their order shews chargeability and a settlement, and is made on evidence which they were obliged to receive as good, unless informed to the contrary. The orders must therefore be confirmed.

LITTLEDALE J. Every thing done by the justices was correct, if there was no objection to the testimony on which they acted; and it does not appear that they had any knowledge of the party having been convicted. They might, indeed, have enquired; but no enquiry took place. The examination was perfect, as far as the proceeding went; the case is the same as if they had examined witnesses who afterwards turned out to be interested; and this would clearly be no objection to the examination.

PATTESON J. The appellants do not shew in their notice of grounds of appeal, nor does it appear otherwise, that the two justices knew of this objection: therefore the examination is, on the face of it, good. It states that the party was a prisoner in *Bodmin* gaol; but he may have been merely committed for trial. *Regina v. Black Callerton (b)* was a different case; for there a palpable omission appeared in the examinations; the pauper must have been chargeable, or the magistrates could not have had jurisdiction; evidence of

(a) 5 B. & Ald. 484.

(b) *Ante*, p. 679.

that

that fact must have been received; and the whole evidence ought to have been set out (a). That was the ground of decision. The record of conviction here gives a date prior to that of the examination; but that may be by relation to the first day of the sessions. And, however this might be, I am not sure that the proceeding of the justices was wrong. The objection to this evidence applies only to the proceeding at sessions. The record of conviction would have been of use when the witness was produced there; but the attempt here is to make it bear upon the examination. Having never attended sessions, I do not know what the practice was formerly in cases of this kind, and whether, if respondents were prepared with good evidence on the hearing of an appeal, it could ever have been objected that the case was proved by improper evidence before the removing justices; but now, under stat. 4 & 5 W. 4. c. 76., the ground of removal is to appear by the examinations transmitted with the order: here it does so appear, and no objection to the examinations is shewn.

COLERIDGE J. I think the objection taken at sessions was not relevant. It is decided, now, that every thing requisite to make the removal valid must appear on the order and examinations; and that rule was complied with here. But, assuming that appellants may shew at the sessions, not only that the examinations, on the face of them, do not justify the removal, but, even where that is not so, that the examination was in fact irregularly taken, nothing wrong appears in this case. The witness *Bray* was *primâ facie* competent. The two

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(a) *Regina v. Outwell*, 9 A. & E. 836.

justices

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justices went to him in the gaol; but it is not stated that they had any proof of his conviction. Then they were bound to examine him. The case is like that put by my brother *Littledale*, of an order made on the examination of witnesses who, by subsequent proof, are shewn to have been interested. The incompetency so established is of no consequence as to the examination: the magistrates were bound to take it at the time; and their order was rightly made.

Orders confirmed.

Saturday,
June 22d.

The QUEEN against The Inhabitants of
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A case from the quarter sessions stated that, the justices being equally divided in opinion, the chairman gave a casting vote in favour of the order, which was confirmed accordingly; that on the following day the appellants' counsel protested against the legality of the decision; that "the question" was then argued on

ON appeal against an order for the removal of *Louisa Berrington*, from the parish of *All Saints* in the borough of *Evesham* in the county of *Worcester*, to the parish of *Fladbury* in the same county, the sessions confirmed the order, subject to the following case.

In 1811 the father of the pauper rented under a verbal agreement, and occupied for a year, a cottage, yard, and garden, for which he paid 10*l.*; but included in the taking was a right of ferry over the river *Avon* from the river bank of the premises in question to the opposite bank of the river in the parish of *Crophorne*. The use of the ferry-boat and line was also included.

both sides, and that the justices then present "determined to adhere to" the former decision: Held, that, although the proceeding on the first day was irregular, this Court would not assume that the decision on the second day was not a judgment upon the merits.

Pauper rented a cottage and premises, including a ferry with the use of a boat and line, across an adjoining river. The premises, without the ferry, were not worth 10*l.* a year. Held, that the ferry might be included in order to make up the necessary value; and that, supposing the boat and line to be distinct personal chattels, the Court would not presume that the value of the tenement would be insufficient without them, upon a case reserved which did not shew such insufficiency.

The

The emoluments of the ferry were derived partly from sums paid in gross in lieu of tolls, and partly from specific tolls, which were paid sometimes on the *Fladbury* side, sometimes in the course of the transit, and sometimes on the *Croptborne* side. The cottage, yard, and garden were not worth 10*l.* per annum alone; and it was contended by the appellants' counsel that, under the circumstances, "the value of the ferry, &c." could not be called in aid to augment the value of the tenement in *Fladbury*. The sessions held otherwise. A difference of opinion arising on the bench, as to whether the premises, together with the ferry, were of 10*l.* value by the year, an equal number of magistrates, including the chairman, voted on each side; upon which the chairman, with the assent of all the magistrates, except one, gave a casting vote in favour of confirming the order, and it was confirmed accordingly. On the following morning the appellants' counsel, having discovered how the decision had been given, protested against its legality; "the question" was argued by counsel on both sides; and the magistrates then present, not being entirely the same as those who had so voted on the previous evening, "determined to adhere to the decision of the preceding day." If the Court should be of opinion that the decisions of the sessions were correct, then the order was to be confirmed; otherwise to be quashed.

Kelly and *Domville* in support of the order of sessions. However irregular the proceedings of the first day may have been, they were cured by a regular judgment of the majority on the following day; and the case distinctly states a decision of the Court which must be presumed to be

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be regular. If the Court had adjourned till the next day by reason of the want of unanimity, they could only have done as they did, that is, put the question to the vote a second time.

Then as to the settlement, a franchise, such as a ferry, is, legally speaking, a tenement; 2 *Black. Com.* 17.; but, whether it be or not, the emoluments of it may be added to the cottage and premises for the purpose of making up the value; *Rex v. Bubwith* (a). The boat and line are appurtenant to the ferry; but, if taken as mere personalty, they may also be added for the same purpose. Thus water or windmills, containing moveable machinery which make up the value, will give a settlement; *Evellin v. Rentcombe* (b), *Rex v. Butley* (c). At all events, as the value of the boat and line is not found in the case, this Court will not deduct it from the value of the premises and ferry, as there stated. Where furnished rooms were rented at 10*l.* a year, and nothing was found as to the value of the furniture, the renting was considered sufficient, in *Rex v. Whitechapel* (d); and the same was held of a colliery let with its live stock, ropes, &c.; *Rex v. North Bedburn* (e).

Whitmore contra. The judgment given on the first day was a nullity; the chairman had no casting vote, nor could the consent of others give it to him. The justices ought to have adjourned till there was a majority; 2 *Nol. P. L.* 546 (g). This Court may direct them now to enter continuances for the purpose of hearing the appeal. The proceeding of the next day did not

(a) 1 *M. & S.* 514.(b) 2 *Salk.* 536.(c) *Bur. S. C.* 107.(d) 2 *Bott.* 84. pl. 132. 6th ed.(e) *Cald.* 452.

(g) 4th ed.

mend the defect. [Lord *Denman* C. J. If the sessions had adjudged that the order of removal should stand, because the Court was equally divided, would not that have been sufficient? (a)] It would not; and, if it would, that is not what the sessions have done. They have grounded their decision on a majority illegally obtained. [Lord *Denman* C. J. On the second day, the decision may have been on the merits.] The only point argued and determined on the second day was, the legality of the proceeding on the first. If they had merely pronounced a judgment without shewing why or how they had decided, this Court would not have enquired further; but here they refer to the opinion of this Court the legality of the whole proceeding.

As to the settlement, the questions will be, 1. Is the ferry a tenement? 2. Had the pauper any legal interest in it? 3. Can it be included in the value? A ferry is a mere franchise, not lying in tenure: no interest in it, or in the tolls, can pass without a deed; and, therefore, no settlement could be gained; *Rex v. Chipping Norton* (b), *Rex v. North Duffield* (c). In *Rex v. Bubwith* (d) the sufficiency of the demise was assumed. Without a deed, the verbal grant operated as a mere licence. Then part of the grant was the mere use of personal chattels, namely, the boat and line, which cannot be considered in estimating the annual rent or value of the house and premises; 2 *Nol. P. L.* 34.

LORD DENMAN C. J. The proceeding of the justices on the first day was no doubt irregular. But, on the

(a) See *Rex v. The Justices of Monmouthshire*, 4 B. & C. 844.; *Rex v. The Same*, 8 B. & C. 137.

(b) 5 *East*, 239.

(c) 3 *M. & S.* 247.

(d) 1 *M. & S.* 514.

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next,

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next, the matter was again discussed, and we cannot presume that the judgment then pronounced was entirely independent of the merits. It does not appear to have proceeded solely on the ground that the first decision was regular. Then as to the settlement, it is found that the cottage and premises were not alone of sufficient value; but the enjoyment of the ferry and its tolls was included in the demise, and the whole together made up the required value. As to the boat and line, supposing them to be distinct from the ferry, the case does not find their value; nor shew that, without them, the tenement was worth less than 10*l.* per annum. *Res v. Whitechapel* (a) is therefore in point.

PATTERSON (b) and WILLIAMS Js. concurred.

S.

Order of sessions confirmed.

(a) 2 *Bott*, 84, pl. 132. 6th ed.

(b) *Littledale J.* was absent.

1839.

The QUEEN *against* The Inhabitants of
BRIDGEWATER.

Saturday,
June 22d.

ON appeal against a rate, made on the 6th *October*, 1838, for the relief of the poor of the parish of *Bridgewater*, in the county of *Somerset*, on the ground that certain inhabitants had not been rated in respect of stock in trade producing profit within the parish, the court of quarter sessions for the county of *Somerset* amended the rate by inserting the names of the parties so omitted, subject to the opinion of this Court on a case of which the following are the material facts.

Before the passing of stat. 5 & 6 W. 4. c. 76. (Municipal Corporation Act), the borough of *B.* had a quarter session and four justices, but no non-intromittant clause. The parish of *B.* was wholly within the jurisdiction of the borough justices, though part only was within the borough; and both parish and borough were within the county of *S.* By the operation of that act, part only of the parish was included within the new boundary of the borough, and neither the recorder, nor the borough justices, had any jurisdiction over the rest

The whole borough and parish of *Bridgewater* is within the county of *Somerset*. The borough has a recorder and quarter sessions under stat. 5 & 6 W. 4. c. 76. (Municipal Corporation Act.) Before the passing of that act, the borough had justices of its own, and a separate court of quarter session, but no non-intromittant clause in its charter. The ancient borough contained a part only of the parish; but the jurisdiction of the borough justices was co-extensive with the parish. The boundaries of the borough were altered by the above act. They now exclude some parts of the parish, and include parts of some adjoining parishes. The grant of a quarter sessions, by letters patent, is dated 10th *June*,

of the parish. Since that act, there were separate quarter sessions and seven justices for the borough. The overseers of the parish made one poor-rate for the whole, which was duly allowed by justices, both of the county and borough. An inhabitant and occupier of land in the part out of the borough appealed against the rate, on the ground that certain inhabitants of the part within the borough were not rated in respect of stock in trade.

Held, that the county sessions had jurisdiction to try the appeal, and to amend the rate by inserting the stock in trade; for that the county justices had jurisdiction by virtue of 1 G. 4. c. 36., before the passing of stat. 5 & 6 W. 4. c. 76.; and sect. 111 of the latter act excludes their jurisdiction only where the borough was before exempt from it.

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able, the rate was to be quashed accordingly. If the opinion of the Court should be that the sessions had no jurisdiction either to amend or quash, the rate was to be confirmed.

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Bere and *M. Smith*, in support of the order of sessions. Since *Regina v. Lumsdaine* (a) the question as to the rateability of stock in trade must be considered as settled. [This was conceded on the other side.] Then the only questions remaining are, as to the jurisdiction of the county sessions, or their power to amend the rate. It is clear that no appeal lay to the borough sessions, because the appellant resides, and is rated in respect of property, out of the borough. If, therefore, the county justices have no jurisdiction, the appellant has no remedy. The power of the county sessions must be ascertained by reference to the old statutes, as controlled or altered by the Municipal Corporation Act. Sect. 8 of 43 *Eliz. c. 2.* gave to the head officers of corporations, being justices of the peace, the same powers within the limits of their jurisdictions as the county justices in the execution of that act, and prohibited other justices from intermeddling. As the whole parish was formerly within the liberty, and under the jurisdiction of the borough justices, this act operated as a sort of ne intrumittant clause; *Rex v. The Justices of Essex* (b): and the county sessions had no jurisdiction to try an appeal against a rate for the parish. Then 17 *G. 2. c. 38. s. 5.* provided that, in corporations not having four justices, the party aggrieved by a rate might appeal to the county sessions. As there were four justices at

(a) *Antè*, 157. But see the temporary act, 3 & 4 *Vict. c. 89.*, which prohibits rating any inhabitant, as such, in respect of his ability derived from the profits of stock in trade.

(b) 5 *M. & S.* 513, 515.; per Lord *Ellenborough*.

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Bridgewater, this statute made no alteration. Then stat. 1 G. 4. c. 36. gave the party the option of an appeal to the county sessions, in corporations not having more than six justices, nor jurisdiction over two or more parishes or wards. The effect of this was to give the county sessions jurisdiction over appeals from rates in this borough. Then is there any thing in the Municipal Corporation Act, or in the charter, to take this jurisdiction away, which (*Blankley v. Winstanley (a)*) can only be done by express words? By sect. 7 of the Municipal Corporation Act the boundary of *Bridgewater* is made to correspond with that established by 2 & 3 W. 4. c. 64. (Parliamentary Boundary Act); and by sect. 8 the part of the parish, excluded from the new borough, is thrown into the county. This exclusion from the borough is still further confirmed by stats. 6 & 7 W. 4. c. 103. and 1 Vict. c. 78. s. 30. The appellant is therefore more completely separated from the borough than he was before. Then sect. 111 of the Municipal Corporation Act provides that no part of a borough, for which a separate court of quarter sessions is holden, shall be within the jurisdiction of the justices of the county, *from which such borough was exempt before the passing of the act*. *Bridgewater* was not exempt before; therefore the county jurisdiction is not excluded since the act. The fact that there are now seven justices for the borough is not material; for stats. 17 G. 2. c. 38. and 1 G. 4. c. 36. evidently contemplate justices who can sit at a quarter sessions; whereas, under the new system, the recorder alone is the judge (sect. 105 of 5 & 6 W. 4. c. 76.). Nor is the recorder a "head officer" of a town &c. within

(a) 3 T. R. 279.

sect. 8 of stat. 43 *Eliz. c. 2.*; for sect. 57 of the Municipal Corporation Act gives the mayor precedence. But, whatever be the effect of that act upon appeals by inhabitants within the borough, neither the recorder nor the justices of the borough have any power to try an appeal for a grievance without its limits. Sect. 9 of 43 *Eliz. c. 2.* provides for some cases where a parish lies partly within and partly without a liberty, but does not apply to this case. With respect to the power of amendment, stat. 41 *G. 3. c. 23. s. 1.* gives the power to insert or alter in any manner that shall be thought necessary for giving relief. The alteration therefore has been properly made, unless the Court shall be of opinion that no such power can be exercised over so much of the rate as concerns the part of the parish within the borough; in which case, if the rate be divisible, it must be quashed as to the part out of the borough.

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Sir *J. Campbell*, Attorney General, and *Kinglake*, contra. This is probably a *casus omissus*; and an appeal lies neither to the borough nor the county sessions, because the rate is entire for the whole parish, and neither has jurisdiction any longer over the whole. But it is enough at present to shew that the county sessions has no jurisdiction. The persons and property omitted are both wholly within the borough. The negative words used in sect. 8 of stat. *Eliz.* exclude the county justices; *Rex v. St. Mary, Taunton (a)*, *Rex v. Justices of Essex (b)*. The borough was therefore exempt within the meaning of sect. 111 of 5 & 6 *W. 4. c. 76.*, although there happened to be only four justices

(a) 1 *Bott*, 265.(b) 5 *M. & S.* 513.

overruled by *Rex v. Clifton (a)*.] The decision is overruled, but not the principle on which it is founded, viz. that neither county has jurisdiction over part of a parish in the other. *Rex v. Clifton (a)* decides only that *parishioners* may be indicted, though they live in another county; and that the question was not one of locality. Here the rate is entire, and cannot be divided between two jurisdictions. Suppose the parish lay in two counties; to which sessions must the appeal against a rate be?

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LORD DENMAN C. J. Looking at the acts of parliament in force on the passing of the Municipal Corporation Act, and at the state of the borough at that time, it appears that the county sessions then had jurisdiction to try appeals against a rate for the whole of this parish. By sect. 111 of that act, places, not then exempt from the county jurisdiction, continue subject to it. In this case there was no such exemption: therefore the county justices retain their jurisdiction. If there be any inconvenience in this, it must be remedied by the legislature.

PATTESON J. (*b*). The decision of this case depends on the construction of sect. 111 of stat. 5 & 6 W. 4. c. 76. This parish was always within the liberties of the borough until that act; and by 43 Eliz. c. 2. the appeal lay to the borough officer or justices. The jurisdiction of the borough was untouched by stat. 17 G. 2. c. 38., because it had four justices. After stat. 1 G. 4. c. 36. an appeal lay to the county sessions. The effect of the Municipal Corporation Act, coupled with

(*a*) 5 T. R. 498.

(*b*) *Littledale J.* was at the Central Criminal Court.

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the Boundary Act, stat. 2 & 3 *W. 4. c. 64.*, was to detach part of the parish from the borough, both as to locality and jurisdiction. Then stat. 5 & 6 *W. 4. c. 76. s. 111.* provides, first, for boroughs to which no separate court of quarter sessions shall have been granted; secondly, for boroughs in which such a court is holden; and, in the latter case, no part of the borough is to be within the jurisdiction of the county “from which such borough, before the passing of this act, was exempt.” Now, if there had been more than six justices in the borough when the act passed, the operation of 43 *Eliz. c. 2. s. 8.* would have exempted it from the county jurisdiction, and then the point would have arisen which has been noticed in the argument; for the parish would then have been divided between two exclusive jurisdictions, neither of them having cognizance of the whole rate. But the present case is free from that difficulty; for the whole was within the jurisdiction of the county sessions, as to appeals against rates, before and at the passing of the act; and there is no reason why it should not remain so. The object of the act seems to have been to leave things, in this respect, exactly as it found them.

WILLIAMS J. concurred.

S. Rate confirmed, as amended by the sessions.

1839.

RANDELL *against* WHEBLE.Saturday,
June 22d.

CASE. The declaration, of 30th *May* 1837, stated that *Richard Thomas*, on &c., was indebted to plaintiff in a large &c., exceeding 20*l.*, viz. 50*l.*; that, *R. T.* being so indebted, plaintiff, for the recovery &c., viz. on 20th *February* 1837, sued out of K. B. against the said *R. T.* a *capias* directed to the sheriff of *Berkshire*, bearing date &c., viz. the day and year last aforesaid, commanding the sheriff that he should not omit &c., but enter &c., and take *R. T.* if he should be found in his bailiwick, and him safely keep until he should have given bail or made deposit &c. in an action &c., or should by other lawful means be discharged &c. The rest of the writ was set out, in the form required by stat. 2 *W. 4. c. 39.*, sched. No. 4. (a), and commanded the sheriff immediately after the execution thereof to return the writ to K. B. with the manner in which he should have executed the same, and the day of execution; and, if the same should remain unexecuted, then that he should return the same at the expiration of four calendar months from the date,

Under stat. 2 *W. 4. c. 39.* (and see stat. 1 & 2 *Vict. c. 110. s. 3.* and sched. No. 1.), it was the duty of the sheriff executing a writ of *capias* to arrest on the first opportunity, and an action lay against him for default made before the return day of the writ, provided some actual damage had resulted to the plaintiff; not otherwise. In a declaration for such default, it was not a sufficient allegation of damage to state that defendant did not arrest &c., and wilfully neglected opportunities of doing so,

and that the debtor did not put in special bail according to the exigency of the writ, whereby plaintiff was delayed in the recovery of his debt, and is likely to lose the same. But an averment that the sheriff was in default after the writ was returnable would have implied legal damage.

Seemle, that, on special demurrer, such declaration would have been bad for not averring that the sheriff had been in default more than eight days before the commencement of the suit: but that, on general demurrer, it was sufficient, if the count alleged that the debtor had not put in special bail according to the exigency of the writ.

The declaration ought to have stated that the writ was delivered to the sheriff within four calendar months from the issuing; but, *seemle*, the omission of such statement was matter of special demurrer.

(a) See 1 & 2 *Vict. c. 110. s. 3.*, and Sched. No. 1. The body of the writ of *capias* there given, and the memorandum limiting the time of execution, are substantially the same as in the former statute, except that "one" month is substituted for "four."

OF

debt, and is likely to lose the same, and hath lost and been deprived of the means of recovering his costs and charges by him &c., in and about his said suit against the said *R. T.*, amounting together to a large &c., viz. 100*l.* To the damage &c.

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against
WHEELER.

Plea. That plaintiff ought not further to maintain &c., because, before the expiration of four calendar months from the date of the said writ, and before defendant had been required to return the same by order of *K. B.*, or by any Judge thereof, or otherwise, viz. on 15th *June* 1837, by an order of the same date (the plea then stated an order made in the cause by *Coleridge J.*), it was ordered with the consent of the attornies &c., and the plaintiff, for valuable considerations, undertook, promised, and agreed with *R. T.*, that the plaintiff should not execute or require the execution or return of the said writ, and plaintiff waived and dispensed with the execution and return &c., and wholly discharged the defendant therefrom; whereby, and by means whereof, and the procurement of plaintiff, and according to the course and practice, of the said court, defendant was hindered, prevented, and discharged, thenceforth whilst the said writ was in force, from taking or causing to be taken the said *R. T.* as by the said writ he was commanded; and it from thenceforth became unnecessary and improper for the defendant or *R. T.* to cause special bail to be put in for *R. T.* in the said action &c., according to the exigency thereof, or to otherwise observe the requisition of the said writ; and defendant and *R. T.* were, by the means and procurement of plaintiff, from thenceforth wholly hindered, prevented, and discharged from so doing as they might and otherwise would have done." Verification.

Replication.

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Replication. That, after the delivery of the writ, duly indorsed &c., to wit as in the declaration mentioned, to defendant to be executed, and before the said expiration of four calendar months from the date of the said writ, to wit from the date of the said writ hitherto, *R. T.* was within the said sheriff's bailiwick, and defendant, as such sheriff, at all times during that period could and might have taken and arrested *R. T.* by virtue of the said writ at the suit of plaintiff, whereof defendant during all that time had notice as in the declaration mentioned. And that, defendant having wholly neglected and refused to take and arrest *R. T.* for a long and unreasonable time after he had such notice as last aforesaid, plaintiff commenced and prosecuted against defendant the present action, and proceeded to declare therein against the now defendant for the cause in the declaration and in this plea aforesaid. And that no such order, undertaking, promise, or agreement, as in the last plea mentioned, ever was made until afterwards and long after the happening of all the matters above in this replication mentioned. Verification.

General demurrer and joinder. The ground of demurrer stated in the margin of the paper-book was, that the defendant had four calendar months in which to arrest *R. T.* unless ruled to return the writ previously, and therefore that, he being discharged from executing the writ before any return of it, no action would lie. The demurrer was argued in this vacation (a).

Cowling for the defendant. There is no doubt that, if a good cause of action had accrued before the order

(a) June 20th. Before Lord Denman C. J., Littleton, Patterson, and Williams Js.

of

of *Coleridge J.* was made, that order did not devest it. The plea puts the Court in possession of all the facts, which shew that, if the plaintiff here recovers, a sheriff may be rendered liable for negligence in not executing a writ which he has not been, and never can be, called upon to return. Since stat. 2 *W.* 4. c. 39., an action for not executing a writ of *capias* does not lie against the sheriff till the expiration of four calendar months from the date, or till he shall have been required, by order of the Court or a Judge, to return the writ. Formerly, an omission, before the return day, to arrest, did not render the sheriff liable unless he had not only had an opportunity of arresting, but also failed in producing the defendant at the return day, or some special damage had arisen. The general law on the subject, before the statute, is stated by *De Grey C.J.* in *Hawkins v. Plomer* (a): "In arrests upon *mesne* process, it is sufficient if the sheriff brings in the body on the day of the return; and therefore in *Noy*, 72 (b), a distinction is taken, that in actions for escape on *mesne* process the writ shall surmise that *ad largum ire permisit*, *et non comparuit ad diem*: on process of execution *ad largum ire permisit* is sufficient. And so are the precedents." The sheriff's duty under the new act, 2 *W.* 4. c. 39., appears by the form of a *capias* in the schedule, No. 4., which shews that, if there has been no arrest or order, the expiration of four calendar months is the return day. The averment in the declaration, that bail was not put in according to the exigency of the writ, is unmeaning, or at any rate cannot imply that the four calendar months had elapsed; for

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(a) 2 *W.* Bl. 1048.(b) *The Sheriff of Nottingham's Case*, *Noy's Rep.* 72.

the

portunity, and that bail was not put in for eight days afterwards, and before the commencement of this suit. In *Brown v. Jarvis* (a) Lord Abinger C. B., in delivering judgment, said, "If it had appeared on the face of the declaration that the plaintiff had not sustained any damage from the sheriff's negligence, the judgment must have been arrested; and I do not think the plaintiff could have maintained the action without proof of actual damage." But he concluded that, on the declaration before the Court, the plaintiff appeared to have sustained a damage from the defendant's negligence. And in fact a special damage was averred, namely, that the debtor, being at large, met with an accident which would not have befallen him if he had been in custody, by reason of which he died. Here no damage is particularly alleged. And there it was averred that the defendant might have arrested the debtor after the delivery of the writ, and more than eight days before his death.

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Bere, contra. The real question in *Brown v. Jarvis* (a) was, whether, under stat. 2 W. 4. c. 39., the sheriff was bound to execute the capias in a reasonable time; and the Court ultimately decided that he was. Lord Abinger C. B. said, in delivering judgment, "We think that it is the duty of the sheriff to arrest the party on the first opportunity that he can, and, if he does not do so, that he is guilty of negligence, and will be liable for any damage which may result from that negligence." Many dicta to the same effect were thrown out during the argument; and the observation of Lord Abinger C. B., first cited on the other side, does not appear to have been upheld on the further

(a) 1 M. & W. 704. S. C. Tyr. & G. 1033.

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discussion. That case is not distinguishable from the present. As to damage, the Court there took it for granted, some injury being alleged in the declaration, that there was a real damage. Here a damage is alleged and not denied; the Court will not enquire into its nature. And it is shewn to have arisen from neglect of opportunities. It is contended that eight days should appear to have elapsed between the neglect and commencement of the action. If this objection were of any weight, the plaintiff should have leave to amend. *Brown v. Jarvis* (a) was not reported at the time of the joinder in demurrer. But, in the form referred to by stat. 2 W. 4. c. 39. s. 4., the eight days count from the "execution:" here none took place; there is no time, therefore, from which the days can run. And in fact the days are mentioned in the schedule merely by way of notice to the defendant. The clause relative to them is no part of the mandate to the sheriff. He is to take, and safely keep, the defendant, till he shall have given bail. Where no time is prescribed, a reasonable time is always understood. The memorandum, "This writ is to be executed within four calendar months from the date thereof," merely refers to the enactment in sect. 10, that no writ issued under the act shall run for more than four calendar months from the date. [*Patteson J.* The writ requires the sheriff to return it, if unexecuted, at the expiration of four calendar months from the date.] In *Jacobs v. Humphrey* (b) an action was held maintainable for not selling goods within a reasonable time before the return of a venditioni exponas, though the sheriff had not been ruled, and no time appears to have been specified by the writ.

(a) 1 M. & W. 704. S. C. Tyr. & G. 1033.

(b) 2 Cro. & M. 413. S. C. 4 Tyr. 272.

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Cowling, in reply. *Jacobs v. Humphrey* (a) supports the argument for the defendant, for the declaration there stated that the sheriff had not the money arising from the sale at *Westminster*, &c., at the return day of the writ. That case shews that an actual ruling of the sheriff to return the writ is not necessary, but that the return day must be past before a right of action attaches. [*Patteson J.* According to your argument the sheriff may put off the return by his own negligence for any length of time within four months.] The plaintiff may rule him to return the writ. If he makes default, an action lies; that is, after the eight days have elapsed, but not immediately on the default. And the default of itself is not sufficient: there must be a legal grievance (b), and that cannot have arisen till the expiration of four months, or at least of the eight days for putting in bail. [*Patteson J.* From what period would you reckon the eight days in such a case as this?] From the time when the sheriff had an opportunity to arrest and omitted doing so. In *Aireton v. Davis* (c) the declaration seems to have been conformable to the principles here relied upon. [Some defects in the declaration, adverted to by the Court during the argument, will be found sufficiently noticed in the judgment.]

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

There are many defects in this declaration. It is not stated that the writ was delivered to the sheriff within

(a) 2 *Cro. & M.* 413. *S. C.* 4 *Tyr.* 272.

(b) Lord Denman C. J. mentioned *Williams v. Mostyn*, 4 *M. & W.* 145.

(c) 9 *Bing.* 740.

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four calendar months from the issuing. That perhaps is matter of special demurrer only. Again, it is not stated that the sheriff was guilty of any negligence more than eight days before the commencement of the suit. Now, if the original defendant had been arrested and let go without bail or deposit, still bail above might be put in within eight days from the arrest, and no action would lie against the sheriff until after those eight days. So here, if the plaintiff means to say that the neglect to arrest when he might is, as against the sheriff, equivalent to an arrest and escape, yet, if bail were put in within eight days from such negligence, it would be good. The declaration, therefore, ought to have shewn that eight days had elapsed without bail being put in before the commencement of the suit. It is indeed alleged that the original defendant did not put in bail according to the exigency of the writ; and perhaps that might be sufficient on general demurrer, which this is. Again, no damage is stated, unless some legal damage necessarily results from the neglect of the sheriff. We do not think that any such damage does necessarily result. Consistently with all that is stated in this declaration, the sheriff may *after* a reasonable time had elapsed, and *after* his negligence, have arrested the original defendant, and the plaintiff may have been able to prosecute his action and bring it on to trial quite as soon as if the sheriff had arrested on the first opportunity. We agree with the case of *Brown v. Jarvis* (a) that it is the duty of the sheriff to arrest the party on the first opportunity that he can; but we also agree with the Court in that case, that some actual damage must be

(a) 1 M. & W. 704. S. C. Tyr. & G. 1033.

shewn

shewn in order to make the negligence of the sheriff in that respect a cause of action; and none such is shewn on this declaration. On default made after the writ is returnable some legal damage necessarily arises, because a new writ is necessary. On this ground we think that judgment must be given for the defendant.

But we have also great doubt whether it is not necessary to shew that the writ was returnable, and some default made when so returnable. Formerly the return day was fixed in the writ itself. Now it is fixed, either by the fact of its being executed, or by an order of a judge, or by lapse of four calendar months. It was the duty of the sheriff under the old process to arrest the defendant on the first opportunity as much as it is now; and, though no action would lie till after the return day, because the sheriff, having neglected his duty once, might still repair that neglect by arresting the defendant and having him ready at the return day, yet he ran the risk of being able to do so after once having neglected. So now, having once neglected his duty, yet, if on being called on to return the writ he chose to return *cepi corpus*, and were to put in bail within eight days from that return, it may be very doubtful whether any action would lie. The sheriff ought undoubtedly to arrest as soon as possible, and so make the writ returnable as soon as possible, and return it; but, if he does not, the plaintiff has the means of making the writ returnable and obtaining the fruit of it by bail being put in, or, if not, by an action against the sheriff. Again, it is quite consistent with all that is stated in this declaration, there being no averment of the writ being returnable, that the sheriff may have taken a deposit of the money without actually arresting, and so there may be no breach

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of duty at all. However, as this objection was taken in *Brown v. Jarvis* (a) and did not prevail, we do not decide upon any such doubt.

Judgment for defendant.

(a) 1 M. & W. 704. S. C. Tyr. & G. 1033.

Saturday,
June 22d.

THE QUEEN *against* The Select Vestry of the Parish of ST. MARGARET, in the Borough of LEICESTER.

Where an act of parliament authorised and required a select vestry from time to time, as often as occasion required, to make rates for the relief of the poor and the repair of churches and highways in the parish: Held, that they were not compellable to make a church rate upon demand, while the churchwardens refused to state the necessary amount, or to furnish any estimate of it, or to give to the vestry any information whereby they might ascertain it.

MANDAMUS (a) to the select vestry of the parish of *St. Margaret*, in the borough of *Leicester*, to levy and assess a rate according to the directions of stat. 2 W. 4. c. x. (local and personal, public), of sufficient amount to defray all expences required for the repair of the churches and burial ground of the parish, and for defraying all the expences incidental thereto or connected therewith, &c., during their year of office; and to do every act necessary to be done in order to levying and assessing such rate, &c. (b).

The

(a) See the argument on granting the writ, *Regina v. The Select Vestrymen of St. Margaret, Leicester*, 8 A. & E. 889.

(b) Sect. 39 enacts that it shall be lawful for the select vestry for the time being, and they are hereby authorised and required, from time to time, as often as occasion shall require, to lay and assess upon all and every the tenants and occupiers of houses, &c., within the parish, according to the respective annual value thereof, rates for the maintenance and relief of the poor of the said parish, &c., and rates for the support and repair of the churches and burial ground of the said parish, and for defraying all the expences incident thereto, or connected therewith, or for any purpose to which church-rates are or shall by law be applicable; and also rates for defraying the expences to be incurred in repairing the highways, streets, and roads within the said parish, &c.

By sect. 63, the monies from time to time received by virtue of this act, under the rates called church-rates, shall (after payment of the costs, charges,

The return to the above writ stated, among other things, that the select vestry had met together in obedience to the writ, and that *G. Marston*, one of the churchwardens, being the only one then present, was required to state to the vestry the amount of money necessary for the purposes mentioned in the writ, and to furnish to them an estimate of the works necessary for the support and repair of the churches and burial ground, and an account of the necessary expences incident thereto and connected therewith, &c., in order to enable the vestry to lay and assess a rate according to the directions of the said act. That at such meeting the churchwardens then wholly neglected and refused to state &c., or to furnish &c., or to give to the said vestry any information by which they might ascertain and determine the rate which should be laid and assessed according to the directions of the act, and in obedience to the said writ. That the meeting was then

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charges, and expences attending the collecting, receiving, and managing the same) be paid over by the select vestry to the churchwardens, or one of them, for the time being, to be by them or him applied and accounted for in manner as by law established.

By sect. 93, an appeal to the quarter sessions of the borough or county is given to any person who shall think himself aggrieved by any survey, valuation, sale, or other act or matter made, done, or arising under or in pursuance of the act, &c.

By sect. 21, the vestry is required to keep a book or books, and to cause regular accounts to be entered therein of all sums of money received and expended for or on account of the parish under the authority of the act, which books are to be open to the inspection of all ratepayers, &c.

Sect. 103 provides that the act shall not extend to invalidate or avoid any ecclesiastical law or constitution of the Church of *England*, or to abridge or controul the rights or powers of the Bishop of *Lincoln*, &c., or of any other person having ecclesiastical jurisdiction in or over the parish, or any matter or thing concerning the churches of the parish, &c.

Mellor, *contra*. The return is sufficient: the facts stated in it must be taken to be true; and no collusion or improper motive can be implied. The only fault is with the churchwardens, who obstinately refuse to supply the necessary information to the select vestry. Without such information a rate made by the vestry must be made at the hazard of turning out a bad or an insufficient one; for, if it be unnecessarily high, it will be illegal; *Brettell v. Wilmot* (a); and, if it be not high enough to cover the expence of repairs, then another must be made, which will be retrospective, and therefore bad. The uniform practice is for the churchwardens to make a survey, and to lay an estimate of the expence of repairs before the vestry when a rate is required; *Prideaux, Directions to Churchwardens*, p. 67—70. (10th ed.). In *Veley v. Burder* (b) the libel, which was for non-payment of a church rate, alleged a survey and estimate; the same course was pursued in *Harrington v. Stow* (c), and is represented by the Court as the proper course in *Brettell v. Wilmot* (a). Many items of expenditure are of a nature that requires the express assent of the vestry, as bells, organs, &c.; *Pearce v. The Rector of Clapham* (d), *Jay v. Webber* (e). These may be very properly submitted to the consideration of the vestry; but the vestry ought at least to be informed of the probable expence of them. It is said that the vestry may as easily estimate the expence of repairs as the churchwardens; but no one, except the

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(a) 2 *Lec's Ecc. Rep.* 548.

(b) *Braintree Church Rate Case*, Consist. Court, reported by G. W. Johnson Esq. ed. 1837; since reported 1 *Curt. Ecc. Rep.* 372.

(c) Cited from a MS. in a pamphlet by Dr. Nicholl, (ed. 1837), entitled "Observations on the Attorney General's letter to Lord Stanley."

(d) 3 *Hagg. Ecc. Rep.* 16.

(e) *Id.* 7.

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minister and churchwardens, has a right to enter the church when not open for divine service; *Jarratt v. Steele* (a), *Lee v. Matthews* (b). The freehold, both of that and of the church-yard, is in the parson, while the oversight and care of them belong to the churchwardens; canon 85. (1603), cited in 1 *Gibson's Codex Jur. Ecc. Anglic.* p. 194. (2d ed.). The expense of such an estimate may be lawfully charged by them on the rate. The right and duties of churchwardens remain exactly as before, notwithstanding the statute, which, by sect. 103, provides for the continuance of all ecclesiastical laws.

Balguy, in reply. The statute expressly throws on the vestry the duty of making rates, and the churchwardens have no longer any concern with the making of them. Incidentally to this duty, the vestrymen may of course enter into and survey the fabric, and do every thing necessary for the effectual execution of their office. They can, at all events, look at their own books, which they are directed by sect. 21 to keep, and ascertain from them the average expences. [*Patteson J.* The books will shew only what the vestry has paid to the churchwardens; not what the churchwardens have laid out.]

Lord DENMAN C. J. The churchwardens are bound to make some estimate for the guidance of the vestry, or, at least, to give them information as to the amount of the current expences, and ordinary wants of the

(a) 3 *Phill. Ecc. Rep.* 169, per Curiam.

(b) 3 *Hagg. Ecc. Rep.* 173, per Curiam.

parishioners.

parishioners. The churchwardens have the best means of obtaining the proper information on these matters. They have a controul over part of the church, and the general care and custody of the property belonging to the parish. The statute has not altered their duties in this respect.

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PATTESON J. The same section which provides for the making of church rates also applies to poor rates and highway rates. If, therefore, the vestry are bound to find out the requisite amount to be raised in one case, they must also do it in the other cases. This would be a very extraordinary construction to put upon the act. I think the vestry cannot be compelled to make the rate, as long as the churchwardens refuse to give to them any information for the purpose of ascertaining the necessary amount.

WILLIAMS J. concurred.

S.

Judgment for the defendants.

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*Saturday,
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The QUEEN *against* The Governors and Directors of the Poor of the United Parishes of ST. ANDREW, HOLBORN, above the Bars, and ST. GEORGE the MARTYR, in the County of MIDDLESEX, and C. BOYDELL, their Clerk.

Mandamus to the officers of a parish included in an union (formed under 4 & 5 W. 4. c. 76. s. 26.) reciting the due appointment of certain persons to be guardians of the poor of the union, and directing them to pay a sum, out of the poor rates collected by them, to the treasurer of the union. Return, that the said supposed guardians were not, nor were any of them, duly appointed under the provisions of the act, &c. ; and that, at the issuing of the said writ, the said supposed guardians therein mentioned were not, nor were any of them, guardians of the poor of the said union.

MANDAMUS to the governors and directors of the poor of the above parishes, appointed under stat. 6 G. 4. c. clxxv. (local and personal, public), and to C. Boydell, their clerk, reciting the formation of the said parishes into a union under 4 & 5 W. 4. c. 76., and "that, under the provisions of the last-mentioned act of parliament, and under the rules, orders, and regulations of the said Poor Law Commissioners, certain persons have been duly appointed guardians of the poor of the said union, and, as such guardians, have taken upon themselves the maintaining, providing for, regulation, and employment of the poor of the said union ;" the issuing of a precept by the said guardians, under the provisions of the last-mentioned act, and the rules and regulations of the said commissioners, directed to the defendants, requiring them to pay a certain sum to the treasurer of the union out of the poor rates of the united parishes, collected by them, towards the relief of the poor of the said parishes, and towards defraying such proportion of the general expenses of the union as was lawfully charge-

Held, that the return was insufficient for not distinctly setting forth any defect in the appointment.

Return quashed on motion, and peremptory mandamus awarded.

able

able thereon; and the refusal of defendants to obey the precept; and commanding them forthwith to obey the said precept, and to pay the said sum to the treasurer, or to collect it by a rate to be made for that purpose, &c.

The return to the writ was in the following words. "We, the major part of the said governors and directors, and the said *Charles Boydell*, do humbly certify and return to our said Lady the Queen, upon the day and at the place in the said writ mentioned, that the said supposed guardians of the poor of the said union, in the said writ mentioned, were not, and never have been, and are not now, nor were, nor are any of them, duly appointed guardians of the poor of the said union, under the provisions of the said act of parliament in the said writ secondly mentioned, or under the said rules, order, and regulations of the said Poor-Law Commissioners therein in that behalf also mentioned, as in and by the said writ is stated and supposed; and that, at the time of the coming of the said writ to us, the said supposed guardians of the poor of the said union therein mentioned were not, nor have they been, nor are they now, nor were nor are any of them, guardians of the poor of the said union. Wherefore we, the major part of the said governors and directors, and the said *Charles Boydell*, have refused, and still do refuse, to obey the said precept in the said writ mentioned, as in and by the said writ we are commanded."

Sir *J. Campbell*, Attorney General, in *Trinity* term last, obtained a rule to shew cause why the return should not be quashed for insufficiency, and a peremptory mandamus awarded. Several objections were made to the return; but, as the judgment of the Court proceeded only on one of them, namely, that it did not specify the grounds on which the appointment of guardians was supposed

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1839. supposed to be illegal, or void, the rest have not been noticed. On the last day of the term (a),

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Sir *F. Pollock* and *Erle* shewed cause, and contended that the return was sufficient, referring to the cases in which a return of "not duly elected" had been held to be sufficient on a mandamus to admit to offices; *Rex v. Williams* (b).

Sir *J. Campbell*, Attorney General, and *Tomlinson*, contra, contended that the return was too general; and they relied upon *Rex v. The Mayor, &c. of Doncaster* (c), *Rex v. The Mayor and Aldermen of Doncaster* (d), and *Rex v. Mayor, &c. of Liverpool* (e). They also contended that, although the appointment might have been irregular, it continued in force until duly avoided.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.

A mandamus issued to the governors and directors of the poor of *St. Andrew's, Holborn*, to pay monies, collected for the relief of the poor under an order of the Poor Law Commissioners, to a board of guardians of an union described in that order as duly appointed. The governors and directors returned to this writ that the guardians were not duly appointed. We have been called on to quash this return on motion, and award a peremptory mandamus, on the ground that it is manifestly bad and illusory. On the other hand, the return is contended for as good, by reference to pro-

(a) *Wednesday, June 12. 1839*, before Lord Denman C. J., *Littledale* and *Patteson* Js.

(b) 8 B. & C. 681.

(c) 2 Lord Raym. 1564.

(d) *Sayer's Rep.* 37.

(e) 2 Burr. 723.

ceedings

ceedings on mandamus to corporate officers bound to admit by swearing in persons elected, where "not duly elected" has been in several cases, particularly in those most lately decided, holden a good return. But we think the distinction clear; the person elected has no right to compel admission without shewing a good title in omnibus, and must be prepared to prove it. If his election, *de facto* made, is bad in law for any defect, it would be wrong to admit him. But, in this case, the commissioners have power to form unions; elections of boards are to be made as the act directs. This board is in full exercise of all its authority; monies collected for the use of the poor are to be paid according to orders issued by the commissioners; and their orders have the force of law, unless and until they are set aside by this Court. Here they can do the thing required; and those who obey their orders will incur no responsibility by doing so. If there really were any doubt whether the existing guardians are duly appointed, it must arise from some defect existing in point of fact, which ought to be distinctly set forth by any one who disputes their *primâ facie* power. If any such fact had been returned to the writ, we might have exercised our judgment whether, if established, it would have defeated the commissioners' authority; but the statement that, for some undisclosed reason, the parties charged with a plain duty refused to perform it because they chose to say, in general terms, that those to whom they are bound are not duly appointed to their office, is wholly insufficient.

A peremptory mandamus must therefore go.

Rule absolute (a).

(a) As to quashing a return on motion, see *Regina v. Payn*, 6 A. & E. 392, 402.; *Regina v. St. Saviour's, Southwark*, 7 A. & E. 925.

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The QUEEN *against* JOHNSON.

Under stat. 5 & 6 W. 4. c. 76. s. 114., the county treasurer may order the council of any borough within the county, having separate quarter sessions, to pay the county the expences of prisoners committed from such borough for trial at the assizes and confined in the county gaol, though such prisoners were committed before trial to the borough gaol, not the county gaol, and were not confined in the county gaol till after the bills against them were found.

And such order may be made without any contract between the borough and county justices.

The expences are to be estimated by dividing the whole expences of the gaol according to the number of prisoners and the periods of their confinement, and are not limited to the expences incurred in respect of the individual prisoners.

GREAVES obtained a rule in *Hilary* term, 1838, calling on the prosecutors to shew cause why an order of *Coleridge J.*, described in the rule, should not be quashed for the insufficiency thereof, and the award and all other proceedings had thereon be set aside.

The order (dated 28th *July* 1837) recited that it had been proved before Sir *J. T. Coleridge, &c.*, one of the justices of assize for the county of *Hereford*, that, on 7th *July* then instant, a statement or account in writing was made and sent by the treasurer of the county to the council of the city or borough of *Hereford*, purporting to be a statement or account of the costs of maintenance, in the gaol of the county, of certain offenders therein named, committed from the borough (in which a separate court of quarter sessions of the peace is holden) for trial at the assizes of the county, from 1st *January* to 1st *July*, 1837: that an order, dated 7th *July* then instant, was made by the treasurer upon the council, for payment of 28*l.* 15*s.* 6*d.* for the maintenance of the said offenders in the county gaol, with the further sum of 10*s.* for the reasonable costs and charges of making and sending such account: and that a difference had arisen between the parties concerning the account, and such difference had not been adjusted by agreement between themselves. The order then proceeded as follows. "Now I do therefore, in pursuance of the statutes in such case" &c., "on the application

application of the said" &c., "as such treasurer as aforesaid, one of the said parties, nominate, by this writing under my hand, *Charles Thapland Whitmore*, Esq., Barrister at law, not having any interest in the question, to arbitrate between the parties, according to the powers and provisions of the several statutes made and now in force for that purpose: and, by consent of the said parties, I do hereby direct that the said arbitrator shall state specially the facts as to the commitment of the said several prisoners in the said account mentioned, and as to the mode in which the said prisoners were transferred from the prison in and for the said city or borough of *Hereford* to the prison in and for the said county, and all other matters touching the same, in order that the opinion of the Court of Queen's Bench may be taken on the same; and shall further find the sum which ought to be paid for maintenance of each prisoner per week in the said county prison by the council of the said borough."

The award recited the above order, and proceeded as follows. "Firstly, I do find that, for several years before and until" 27th *June* 1836, "a contract had been made, and existed, between the justices of the peace of the city of *Hereford* and the justices of the peace of the county of *Hereford*, for the support and maintenance, at 5s. per head a week, in the gaol or house of correction of the said county, of any prisoners committed thereto from the city aforesaid, pursuant to the statute 5 G. 4. c. 85., intituled" &c.; "which contract was put an end to on the said" 27th *June* 1836; "and during that period, and from thenceforward until the passing of the statute 5 & 6 W. 4. c. 76., intituled" &c., "prisoners intended to be tried at the assizes have

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been, in the first instance, committed to the city prison, and, at the assizes, have been taken into the shire hall, and there, as soon as a bill against them was found, delivered by the gaoler of the city prison to the gaoler of the county prison; and, in case of conviction, they have invariably been committed to the county prison or house of correction. The same practice has been pursued with regard to the prisoners touching whom the present question arises. These prisoners were severally committed to the city prison for trial at the assizes for the county, and, after conviction, were committed in execution of their sentences to the county prison: and the charges in question are in respect of their imprisonment therein under the circumstances above stated. These charges are made upon a calculation of the proportion which the expence of each prisoner bears to the total expences of the gaol, on the average of one year, as set forth in the paper marked A., annexed to this my award. And, it being agreed by the parties that the order of the treasurer, marked B., hereunto annexed, shall have the same effect as if it were an order for the costs of the maintenance and punishment of the prisoners, and not of their maintenance only, I do find and award that, if the council of the city or borough of *Hereford* are by law liable in respect of prisoners committed to the county gaol in manner hereinbefore stated, and if it is considered that the said council are liable for the proportion of each of such prisoners to the general expences of the gaol, then the sum of 9s. a week for each of such prisoners ought to be paid by the said council to the treasurer of the said county: but, if it is considered that the said council are liable only for the personal expences of such prisoners, that is, in
respect

respect of their clothing, washing, fuel, wear and tear of furniture, punishment, and such other expenses as are a charge upon the gaol, directly and solely occasioned by their imprisonment therein, then I find and award that the said council ought to pay to the said treasurer the sum of 5s. a week for each of such prisoners."

The paper marked A., annexed to the award, was signed by the clerk to the gaol, and headed, "Statement of Expences of the *Hereford* County Gaol from *Easter* 1836 to *Easter* 1837." The statement comprehended the whole expences of the gaol, without reference to particular prisoners, under the heads, "Salaries," "Cash-payments," "Repairs," "Manufactory," "Grain," "Coals," "Meat," "Groceries," "Books," "Insurance," "Taxes." From the sum total, there was a deduction entitled, "C^r. By grain ground for hire, and articles sold." The balance was 161*l*. 16*s*. A calculation as follows was added.

The number of prisoners for every day throughout the year, from *Easter* 1836 to *Easter* 1837, added together, the total number is 22,972.

$$365 \overline{) 22972}$$

$62 \frac{342}{365}$ average per day.

£	s.	d.				
52)1613	16	0				total expences per annum.
7)	31	0	8½	-	-	per week.
63)	4	8	8	-	-	per day.
	1	4½		-	-	per head per day.
		7				
	9	9½		-	-	per head per week.

Paper B. contained the names of the prisoners from
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Hereford, with the several periods of their detention in the prison, and the expence for each, estimated at 9s. per week; the whole amounting to 28*l.* 15*s.* 6*d.* The treasurer's order on the council for that sum, with 10*s.* for the reasonable costs and charges of making and sending the account, was written under the account, and signed by the treasurer, dated 7th *July* 1837.

In last *Michaelmas* term (a),

Sir *W. W. Follett* and *R. V. Richards* shewed cause. First, the borough is bound to contribute to the expenses. The Municipal Corporation Act, stat. 5 & 6 *W. 4. c. 76. s. 114.*, enacts "that the treasurer of every county in *England* and *Wales* shall keep an account of all costs arising out of the prosecution, maintenance, and punishment, conveyance and transport of all offenders committed for trial to the assizes in such county from any borough in which a separate court of quarter sessions of the peace shall be holden;" and the treasurer is directed to send a copy of the account to the council, and to make an order on them for the payment; and the council are to order the same, with reasonable charges for the account, to be paid out of the borough fund: and, in case of any difference respecting the accounts, it is to be decided by the arbitration of a barrister appointed by the judge of assize, as under stat. 5 *G. 4. c. 85. s. 2.* Here the prisoners were committed for trial at the assizes, from *Hereford*, which has a separate quarter session. It will be argued, on the other side, that sect. 114 does not apply, because the prisoners were not committed for trial to

(a) *Wednesday, November 14th, 1838. Before Lord Denman C. J., Patteson, Williams, and Coleridge Js. The case was set down in the crown paper, but was not argued on concilium.*

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the county gaol, but to the borough gaol, and were afterwards committed to the county gaol only in execution of the sentence. But the act does not make it necessary that the committal for trial should be to the county gaol; all that is required is that the committal should be from the borough (that is, by the borough justices), and for trial at the assizes. The intention is to make the borough contribute to the expence of its own criminals. There have been various enactments and decisions as to the liability to such a contribution. In *Rex v. Clarke* (a) it was held that the city of *Bath*, not having jurisdiction to try felons, was not within the proviso of sect. 1 of stat. 55 G. 3. c. 51., which exempts from the county rate "places situate within the limits of any liberties or franchises having a separate jurisdiction;" it being considered that the separate jurisdiction meant was a jurisdiction coextensive with that of the county justices who were to impose the rate. The principle of this decision was that *Bath* threw the expences of the felons of her own district upon the county, and was therefore bound to contribute. That principle applies here. In *Rex v. Clarke* (a), it is true, the borough justices committed to the county gaol for trial. That also was the case in *Rex v. Shepherd* (b), where the borough of *Marlborough* was held to be exempt from county rates, although it had no jurisdiction to try felonies; and the distinction between that case and *Rex v. Clarke* (a) was that *Marlborough* did, and *Bath* did not, raise within itself a rate in the nature of a county rate. In *Mercer v. Davis* (c) the nature of the jurisdiction which would make a borough liable to the county

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(a) 5 B. & Ald. 665.

(b) 2 A. & E. 298.

(c) 10 B. & C. 617.

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rate was discussed. These cases do not directly apply to questions under stat. 5 & 6 W. 4. c. 76. s. 114. Stat. 4 G. 4. c. 64. s. 8. gives the justices of certain places, of which *Hereford* is not one, power to commit to the county house of correction. This does not affect the present case, which arises entirely under stat. 5 & 6 W. 4. c. 76. Nor do the provisions of stat. 5 G. 4. c. 85. apply, which enables justices, &c., "having the government or ordering of any gaol or house of correction, in any city, town, borough, port or liberty, to contract with the justices of the peace, having authority or jurisdiction in and over any gaol or house of correction of the county, riding or division, wherein or whereto such city," &c., "is situate or adjacent," "for the support and maintenance, in such last-mentioned gaol or house of correction, of any prisoners committed thereto, from such city," &c.; and enacts that "during the existence of such contract, every prisoner who would otherwise be confined in the gaol or house of correction of the city," &c., "so contracting, may be lawfully committed or removed to and confined in the gaol or house of correction so receiving him or her under such contract; and all prisoners so confined by contract, whether before or after trial, shall be subject in all matters and things to the same rules and regulations as if they were committed thereto by any of the justices of the county, riding or division." As some boroughs had, and some had not, without contract, the power of committing to the county gaol, and as, in the latter case, there were sometimes contracts for that purpose, stat. 5 & 6 W. 4. c. 76. s. 114. was intended to put an end to the varieties in this respect, and to give the county a general right of demanding from the borough all the expence to which the

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the borough had put the county. Sect. 117 gives counties the power of so recovering all such expences, which are not included under the heads of "prosecution, maintenance, and punishment, conveyance and transport of offenders committed for trial in such county," and (in the case specified) out of coroners' inquests.

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Secondly, as to the amount. It seems reasonable that the general expences of the gaol should be divided among all the prisoners; there can be no ground for fixing them upon one class rather than another. Otherwise the borough will have the benefit of the general expences without contributing to them. For instance, the treadmill is paid for out of the general expences; but it is used for the punishment of borough prisoners as well as others.

Maule and Greaves, contra. The contract alone conferred the power of charging the borough for prisoners committed to the county gaol, although the imprisonments there continued after the expiration of the contract. The contract took effect under stat. 5 G. 4. c. 85. s. 1.; and it is only in such case that sect. 2 authorises an award for the expences. [*Cole-ridge J.* The committal to the county gaol must have formed part of the sentence, in the case of these convicts. *Sir W. W. Follett.* It must have been so always: the judges of assize could commit to no other prison.] If so, the borough would be charged with the maintenance of convicts in a prison to which it did not send them. Before stat. 5 G. 4. c. 85. the justices in some boroughs had the power of committing to the county gaol: and that statute (sect. 1) gave to justices, having the government of any gaol or house of correc-

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tion in any borough, &c., the power of contracting with the justices having the authority over the county gaol, for the maintenance of prisoners "committed thereto, from such city, town, borough," &c. So far there can be no power except by contract, or by the borough having possessed the right, independently of contract, to commit the prisoners to the county gaol; as, by stat. 4 G. 4. c. 64. s. 8., the justices of certain places (not including *Hereford*) have power to commit to the county house of correction. In each case the borough is chargeable for the expences only of prisoners committed from the borough to the county gaol, which the prisoners in this case are not. Then no new power is conferred by the Municipal Corporation Act: sect. 114 merely regulates the mode of keeping the account and obtaining payment. Jurisdiction cannot be given by implication. It is suggested that the words in sect. 114, "committed for trial to the assizes in such county from any borough," will include committals to the borough gaol; but that would be a very forced construction; and, according to it, the treasurer of the county would be directed by the statute to keep account of the expences incurred in the borough gaol, and to charge the borough with them, which is absurd. Whenever any justices, not having the government of a gaol, have powers given to them relating to that gaol, it is by express words, as in stat. 5 & 6 W. 4. c. 76. s. 115., and stat. 6 & 7 W. 4. c. 105. s. 1. And the language of both acts shews that, whenever the committal for trial is made a condition precedent to the right to recover the expences, the committal meant is a committal to the prison in which the expences are incurred. In sect. 2 of stat. 6 & 7 W. 4. c. 105. provision

vision is made for the case of the prison being more than two miles from the borough from which the committal is made. The inconveniences of any construction but that now suggested are manifest. Where a contract is made, there is a limit to the expences: but, according to the construction adopted on the other side, the borough would be liable for expences which it could not control or superintend, and without its consent. At the trial the liability falls on the county, not in consequence of any act of the borough, but because the assizes are held in the county, and the execution of the sentence is consigned to the county authorities. [*Williams J.* Do you give any meaning to the words in sect. 114 of stat. 5 & 6 *W. 4. c. 76.*, "any borough in which a separate court of quarter sessions of the peace shall be holden?"] That restriction was necessary to distinguish the case from a committal by county justices from a place not having criminal jurisdiction. There, no enactment was necessary; and the county would pay the expences of course.

As to the question of amount: the statute clearly intended that such expences should be charged upon the borough as the borough had occasioned to the county. The general expences of the county gaol must have been incurred at all events. Could the county build a new gaol and charge the borough with a share of the expence? The expences here charged do, in fact, contain many such items. Sect. 117 of stat. 5 & 6 *W. 4. c. 76.* shews that only such places as were previously contributory to the county rates are to contribute to any expences except those "arising out of the prosecution, maintenance, and punishment, conveyance and transport of offenders committed for trial in such

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county:" and this only by express provision. Sect. 92 enumerates separately, as expenses to which (among others) the borough fund is to be applied, "the expences of the prosecution, maintenance, and punishment of offenders," and "such other sum to be paid by such borough to the treasurer of such county as is hereinafter provided" (referring evidently to sect. 114), and "the expence of maintaining the borough gaol, house of correction," &c.; but the maintenance of the county gaol is no where mentioned. Stat. 5 G. 4. c. 85. s. 4. gives borough magistrates express power to contract to pay a share of the expence of enlarging the county gaol. This shews that there was no such liability in the absence of contract: and sect. 15 prevents the alteration of previously existing liabilities, either as to repair of the prison or maintenance of the prisoners. The distinction between building or repairing a gaol, and maintaining it, is relied on by Lord *Tenterden* in *Rex v. The Justices of Kingston-upon-Hull* (a).

Cur. adv. vult.

Lord DENMAN C. J., in this vacation (*June 21st*), delivered the judgment of the Court.

This case came before us upon an application to quash an order made, on the 28th of *July* 1837, by my brother *Coleridge*, as one of the justices of assize for the county of *Hereford*, whereby, it appearing that the treasurer of the said county had sent in an account in writing to the council of the city or borough of *Hereford* of certain expences incurred in respect of certain prisoners in the gaol of the said county, committed thereto from the said city or borough, and that

(a) Note (a) to *Thompson v. Raikes*, 1 A. & E. 880.

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the said treasurer had made an order upon the said council for payment, whereupon a difference had arisen between the said parties, the learned Judge nominated a barrister to arbitrate between the parties. Such award was accordingly made; and the sum of 9s. per week was directed to be paid in respect of each prisoner so sent to the county gaol by the said council, if they should be thought liable, in respect of each such prisoner, to the "*general expences*" of such gaol, and the sum of 5s., if the liability of the said council should be confined to the "*personal expences*" of each such prisoner.

And the question is, whether the above mentioned order be valid in point of law; having been made under the authority of stat. 5 & 6 W. 4. c. 76. Now, by the 114th section of that statute, it is enacted that the treasurer of every county "*shall keep an account of all costs arising out of the prosecution, maintenance, and punishment, conveyance and transport of all offenders committed for trial to the assizes in such county from any borough in which a separate court of quarter sessions*" shall be holden (which is the case with respect to the said city or borough of *Hereford*); and the treasurer of every such county shall send a copy of such account to the council of each of such boroughs. Then follows a provision, of the nature described in the said order, under and by virtue of stat. 5 G. 4. c. 85., which is incorporated in the first mentioned act, in the event of such difference as is in the said order also recited, and which had actually taken place. Then follows a provision that the power of contracting by borough justices with county justices for care and maintenance

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maintenance of borough prisoners, under the said act, 5 G. 4. c. 85., shall remain in force.

It was contended, against the jurisdiction to make the said order, that, inasmuch as, generally, the justices of the borough have no power of committing to the county gaol, and, further, as it appears from the said award that a contract between the borough and county justices for the care and maintenance of borough prisoners no longer exists, the treasurer had no right to make the claim from which these proceedings originate. We however think that there is no inconsistency in the provisions of the two statutes; and that, if no contract be made, or in force, under stat. 5 G. 4. c. 85., the power given to the treasurer of the county under the said 114th section of stat. 5 & 6 W. 4. c. 76., may well be exercised.

It is observable, also, that the objection which we are noticing seemed to assume that the said section was applicable only to cases where borough prisoners are committed for trial to a county gaol; whereas the language is "committed for trial to the assizes;" and we think that, without any violent or forced construction, we may consider prisoners who (according to the statement in the award) have first been committed to the city prison, and thence taken for trial to the shire-hall of the county, and, in case of conviction, have invariably been committed to the county prison or house of correction, as falling within this description. We are of opinion, therefore, that the learned Judge did possess jurisdiction, and that his order was properly made accordingly.

We are not sure whether, in the course of the discussion,

cussion, any objection was made to the order, except that which we have already noticed and disposed of.

We think, however, that the larger amount of weekly charge for each prisoner, being "made upon a calculation of the proportion which the expence of each prisoner bears to the total expences of the gaol," is reasonably made, and ought to be paid, seeing that the borough has a proportionable share of the benefits arising from the whole establishment.

The consequence is that the rule must be discharged.

Rule discharged.

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DEBT. The declaration stated that defendant, to wit on &c., was indebted to plaintiff in 45*l.*, as well for a certain crop of growing wheat, and a certain crop of growing barley, of the plaintiff, before then bargained and sold by plaintiff to defendant at his request, and by defendant, under and by virtue of that bargain and sale, accepted, reaped, cut down, had, taken, and carried away, as also for a certain crop and divers quantities of potatoes of plaintiff, before then bargained and sold by plaintiff to defendant at his request, and by defendant, under and by virtue of that bargain and sale, accepted, dug up, had, taken, and carried away; as also for the use of certain land of plaintiff, and the eatage of grass, clover, and stubble thereon growing, and being

Plaintiff and defendant orally agreed (in August) that defendant should give 45*l.* for the crop of corn on plaintiff's land, and the profit of the stubble afterwards; that plaintiff was to have liberty for his cattle to run with defendant's; and that defendant was also to have some potatoes growing on the land, and whatever lay grass was in the fields; defendant was to

harvest the corn, and dig up the potatoes; and plaintiff was to pay the tithe.

Held, that it did not appear to be the intention of the parties to contract for any interest in land, and the case was, therefore, not within the Statute of Frauds, 119 C. 2. c. 3. s. 4., but a sale of goods and chattels, as to all but the lay grass, and, as to that, a contract for the agistment of defendant's cattle.

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by plaintiff before then let to defendant at his request, and by defendant, according to such letting, had and used in and for the depasturing of cattle for a long time before then elapsed; and in 45*l.* on an account stated (a).

Pleas. 1. As to all but 35*l.* 11*s.* 10*d.*, nunquam indebtedatus. Issue thereon.

2. As to 5*l.*, parcel of the 35*l.* 11*s.* 10*d.*, payment before the commencement of the suit, and acceptance in satisfaction and discharge of 5*l.* Replication, that defendant did not pay, and defendant did not accept, &c., in manner &c. Issue thereon.

3. As to 30*l.* 11*s.* 10*d.*, other parcel &c., tender before the commencement of the suit. Replication, denying the tender. Issue thereon.

On the trial before *Bosanquet J.*, at the *Denbighshire* Spring assizes, 1837, it was proved that, in *August* 1835, the plaintiff and defendant agreed orally that the defendant should give 45*l.* for the crop of corn on the plaintiff's land, and the profit of the stubble afterwards; that plaintiff was to have liberty for his cattle to run with the defendant's; that defendant was also to have some potatoes growing on the land, and whatever lay grass was in the fields. Defendant was to harvest the corn, and dig up the potatoes; and plaintiff was to pay

(a) The particulars of demand were as follows. "This action is brought to recover the sum of 45*l.*, as well for a crop of growing wheat and a certain crop of growing barley on the plaintiff's land, and a quantity of potatoes also growing thereon, sold by plaintiff to defendant, at his request, on 7th *August* 1835, as also for the use of certain land of the plaintiff, and the catage of grass, clover and stubble thereon growing, and being by the plaintiff before then let to the defendant, at his request, and by the defendant, according to such letting, had and used in and for the depasturing of his cattle."

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the tithe. It did not distinctly appear whether the sale was by the acre or not. The crops, &c., were taken by the defendant in conformity with the agreement. The payment and tender were proved, as pleaded; and the defendant's counsel contended that the plaintiff was not entitled to recover on the first issue, because the contract proved was for an interest in land, within sect. 4 of the Statute of Frauds. The learned Judge directed a verdict for the defendant on the second and third issues, and for the plaintiff on the first, reserving leave to move for a nonsuit. In *Easter* term, 1837, *Jervis* obtained a rule accordingly. In *Hilary* term last (a),

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Kelly and *Welsby* shewed cause. No interest in land passed by this contract. Nothing was sold but crops which, at the time of the delivery, would be goods within sect. 17 of stat. 29 C. 2. c. 3., and, as there has been acceptance, no writing was necessary. In *Evans v. Roberts* (b) it was held that a sale of growing potatoes was not a sale of an interest in land. In *Crosby v. Wadsworth* (c) the sale of a growing crop of hay was held to be a sale of an interest in land; but there the vendee was to mow the hay. The doctrine ought not to be extended beyond the authorities; for it is notorious that occupiers of land continually make such bargains without any notion of parting with an interest in the land, or of giving, at the utmost, more than a license. The buyer here would have been a trespasser if he had done more than carry away the crop. The inclination

(a) *Thursday, January 24th, 1839, before Lord Denman C. J., Little-
dale, Williams, and Coleridge Js.*

(b) 5 B. & C. 829.

(c) 6 East, 602.

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of the Courts has latterly been to hold similar bargains not to be for interests in land. It was so held in *Sainsbury v. Matthews* (a), though the vendee was to find diggers. *Parker v. Staniland* (b) is in favour of the plaintiff.

Jervis and *Meeson*, contra. *Sainsbury v. Matthews* (a) (as *Parke* B. pointed out) was a mere case of a sale to the plaintiff of potatoes; and the plaintiff, had the potatoes been destroyed before the time for digging arrived, would have had no other right to the land, though, till that time, the agreement was not perfected, because till then it would not be known what was sold. In *Evans v. Roberts* (c) the vendor was to dig the potatoes: he could not, therefore, have parted with the interest in the land. In *Parker v. Staniland* (b) the land was a mere place of deposit, as the potatoes were to be taken immediately; the land contributed nothing to the value of the article sold, after the sale. Here the crops, which include the grass growing, were to continue on the land; and the case, therefore, resembles *Earl of Falmouth v. Thomas* (d) and *Carrington v. Roots* (e), where the contract was held to be for an interest in land. [*Coleridge* J. In *Earl of Falmouth v. Thomas* (d) the pleadings expressly connected the bargain as to the crops with an interest in land.] The decision proceeds on general grounds. In *Carrington v. Roots* (e) the question arose incidentally; and it was held that the vendee could not insist on his right to enter the land

(a) 4 M. & W. 343.

(b) 11 East, 362.

(c) 5 B. & C. 829.

(d) 1 C. & M. 89. S. C. 3 Tyrwh. 26.

(e) 2 M. & W. 248.

and

and take the crops, because, by so doing, he claimed an interest in land, to which he was not entitled according to the Statute of Frauds.

Cur. adv. vult.

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Lord DENMAN C. J., in this vacation (*June 21st*) delivered the judgment of the Court. After stating the nature of the action, his Lordship proceeded as follows.

A motion for a nonsuit was made, by leave, on the ground that the contract proved, which was oral only, was for an interest in land; this was denied in answer; and it was also contended that the state of the pleadings precluded the defendant from taking the objection (*a*).

The contract was made in *August*, when the crops were not ripe, though nearly so; and the witnesses who proved it stated it thus. [His Lordship then stated the terms of the contract as they are given, p. 754., *antè*.] There was some dispute, upon the evidence, whether it was a sale by the acre or not.

Nothing, it will be observed, was expressly agreed on as to the possession of the land. It will be our duty, therefore, in construing the contract as to this particular, to have regard to its subject matter, and to imply

(*a*) One question on the pleadings was, whether the objection on the Statute of Frauds could be taken on the general issue. As to this, the following authorities were referred to. *Reg. Hil. 4. W. 4., Pleadings in particular Actions*, I. *Assumpsit* 1., 5 *B. & Ad.* vii.; *Johnson v. Dodgson*, 2 *M. & W.* 653.; *Elliott v. Thomas*, 3 *M. & W.* 170.; *Barnett v. Glossop*, 1 *New Ca.* 633.; *Carrington v. Roots*, 2 *M. & W.* 248.; *Shearwood v. Hay*, 5 *A. & E.* 383. See *Buttemere v. Hayes*, 5 *M. & W.* 456.; *Eastwood v. Kenyon*, *Hil. T.* 1840, 11 *A. & E.*

Another question was as to the effect of the two pleas of partial tender and partial payment. As to this the following authorities were referred to. *Ravenscroft v. Wise*, 1 *C. M. & R.* 203. *S. C.* 4 *Tyrwh.* 741.; *Meager v. Smith*, 4 *B. & Ad.* 673.; *Middleton v. Brewer*, 1 *Peake*, *N. P. C.* 20. (3d ed.)

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so much, and only so much, as is necessary to give full effect to its expressed terms, nothing appearing in the subsequent acts of the parties to influence our construction either way.

Three things were the subject matter of the contract, crops of corn, potatoes, and the after eatage of stubble and lay grass. Of these all but the lay grass are fructus industriales; as such, they are seizable by the sheriff under a fieri facias, and go to the executor, not to the heir. If they had been ripe at the date of the contract, it may be considered now as quite settled that the contract would have been held to be a contract merely for the sale of goods and chattels. And, although they had still to derive nutriment from the land, yet a contract for the sale of them has been determined, from this their original character, not to be on that account a contract for the sale of any interest in land. *Evans v. Roberts* (a) proceeds on this principle. That was a sale of growing potatoes. *Holroyd J.* says (b), "This is to be considered a contract for the sale of goods and chattels to be delivered at a future period. Although the vendee might have an incidental right, by virtue of his contract, to some benefit from the land while the potatoes were arriving at maturity, yet I think he had not an interest in the land within the meaning of this statute." And *Littledale J.* says (c), "I think that a sale of any growing produce of the earth (reared by labour and expence) in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning

(a) 5 B. & C. 829.

(b) Page 837.

(c) Page 840.

land

land within the meaning of the fourth section of the statute of frauds." *Bayley* J. lays down the same principle, and qualifies, not the judgment, but the dictum, of *Mansfield* C. J. in *Emmerson v. Heelis* (a), which certainly is at variance with the decision of the Court of King's Bench in *Evans v. Roberts* (b). It was a dictum, however, unnecessary to the decision.

The present case differs from *Evans v. Roberts* (b) in this, that there the potatoes were to be dug up by the seller; the judgments, however, do not proceed on this distinction, although it was not unnoticed. *Holroyd* J. expressly says (c) that, even if they were to be dug up by the buyer, "I think he would not have had an interest in the land." And we agree that the safer grounds of decision are the legal character of the principal subject matter of sale, and the consideration whether, in order to effectuate the intentions of the parties, it be necessary to give the vendee an interest in the land. Tried by these tests, we think that, if the lay grass be excluded, the parties must be taken to have been dealing about goods and chattels, and that an easement of the right to enter the land, for the purpose of harvesting and carrying them away, is all that was intended to be granted to the purchaser. It is very difficult to reconcile all the cases, and still more so all the dicta, on this subject, from the case of *Waddington v. Bristow* (d) to the present time: and we are therefore left at liberty to abide by a general principle.

Upon this principle, however, we are to examine whether the introduction of the lay grass into the contract ought to vary the decision. This is the natural

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(a) 2 Taunt. 47.

(b) 5 B. & C. 829.

(c) P. 838.

(d) 2 B. & P. 452.

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produce of the land, not distinguishable from the land itself in legal contemplation, until actual severance; it passes accordingly to the heir, not to the executor; and in *Crosby v. Wadsworth* (a) it was decided that the purchaser of a crop of mowing grass, unripe, and which he was to cut, took an exclusive interest in the land before severance.

If, therefore, this be a case in which the parties intended a sale and purchase of the grass to be mowed or fed by the buyer, both on principle and authority the objection of the defendant must prevail.

Looking, however, at the facts, we think this was not such a bargain. It may well be doubted, upon all the evidence, whether any thing that could be called a crop of grass was in the ground, or in the contemplation of the parties at all: for it does not appear that any clover or other grass had been sown with the corn; and the word grass seems merely to have been adopted by the witness in cross examination from the defendant's counsel. But, not relying upon this, we find that the plaintiff was to pay the tithe, and that, after the harvesting, he reserved to himself the right of turning his own cattle into the fields; and we think that, however expressed, the more reasonable construction of the contract is, that the possession of the field still remained with the owner after the harvesting, as before; it was not necessary to the vendee before, on account of the grass, because that, whatever it was, could not then be got at; nor did it need preservation; and afterwards it is more reasonable to consider the owner as agisting the vendee's cattle, than as having his own cattle agisted by

(a) 6 East, 602.

him

him whose interest at the best was of so very limited a nature.

Upon these grounds, not impeaching the principle of *Crosby v. Wadsworth* (a), but deciding on the additional facts in this case, we think this incident in the contract does not alter its nature; and the objection founded on the statute will not prevail.

This makes it unnecessary to consider the other points, and the rule will be discharged.

Rule discharged.

(a) 6 *East*, 602.

DOE on the demise of HEIGHLEY *against*
HARLAND and Others.

Saturday,
June 22d.

HUMFREY, in last *Easter* term, obtained a rule to shew cause why an order, made by *Patteson* J. in the Bail Court, for staying proceedings in this action till the costs of a former ejectment were paid, should not be set aside. The present action was brought by the son and heir of the lessor of the plaintiff in the former action, against the same defendants, and upon the same title, but for different premises. *Humfrey* cited *Doe dem. Taylor v. Harris* (a) as in point, where this Court, under similar circumstances, refused to stay proceedings. It also appeared that the lessor of the plaintiff in the first ejectment had been attached for non-payment of the costs, and had been discharged under the Insolvent Act, while in custody under such attachment. This, he contended, operated as a discharge of the costs, even if the Court

Where the lessor of the plaintiff in ejectment is son and heir of the lessor in a former ejectment, and claims under the same title, and against the same defendant, but brings his action for different premises, the Court will stay proceedings until the costs of the first action are paid.

And this, although the lessor in the first action was discharged as an insolvent, while in custody under attachment for non-payment of such costs.

(a) 4 *Mann. & Ry.* 569. It is said there, in the judgment of the Court, that the two ejectments were brought against different defendants.

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Cresswell shewed cause (a).

Cur. adv. vult.

LORD DENMAN C. J. now delivered judgment as follows.

The case of *Doe dem. Taylor v. Harris* (b) is contrary to all the other cases on this subject which are collected in Mr. *Tidd's* book, p. 1232., and by which it is clear that, where the title is the same, a second ejectment may be stayed until security for costs of a former ejectment is given, although the party suing in the second is not the same as in the first; for he must be privy in interest. We think, therefore, that there must be some mistake in the report of that case in omitting some peculiar circumstances; at all events we do not hold it binding. The other question is as to the effect of the discharge of the lessor of the plaintiff's father under the Insolvent Act, being then in custody under an attachment for these costs. Now that discharge is no actual satisfaction; and, as the only mode by which a defendant in ejectment can get his costs is by attachment, it is not like the case of a person taking his debtor under a ca. sa. when he might have sued out a fi. fa. There is a case in *Barnes's Notes* (c), where it was held that, if a defendant had the lessor of the plaintiff in custody under an attachment, he could not stay his proceeding in a second ejectment; which may have been on the ground that by keeping him in cus-

(a) Before Lord Denman C. J., *Littledale*, and *Patteson* J.

(b) 4 *Mann. & Ry.* 569.

(c) *Benn v. Denn dem. Mortimer*, *Barnes*, 180.

tody he deprives him, in some sort, of the means of paying the costs of the first action; which ground does not exist here. This rule must be discharged, without costs.

Rule discharged (a).

(a) See, as to the second point, *Doe dem. Standish v. Roe*, 5 B. & Ad. 878.

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HARLAND.

DOE against WRIGHT.

Saturday,
June 22d.

TRESPASS for mesne profits. The declaration (13th June 1837) complained of a breaking and entering, to wit on 10th July 1826, into the plaintiff's manors of *Hornby* and of *Tatham*, with the tithes and appurtenances, and the rectory of the parish of *Tatham*, and the tithes thereof, of the plaintiff, and other lands in the county of *Lancaster*, and expelling plaintiff from his possession thereof, and keeping and continuing plaintiff so expelled until the commencement of the action, and, during that time, taking the rents and profits thereof to defendant's own use.

Pleas. 1. That plaintiff was not possessed of the manors, rectory, tithes, and premises in the declaration mentioned, or any, or either of them, in manner and form &c.: conclusion to the country.

2. As to breaking and entering the manors of *H.* and *T.*, and the other lands (omitting the tithes and rectory), and expelling plaintiff from the possession

Trespass for mesne profits between 10th July 1826 and the commencement of the suit. Pleas. 1. that plaintiff was not possessed of the premises modo et forma. 2. that the premises were the soil and freehold of defendant during all the time, &c. Replication, by way of estoppel, to each plea, that, after 10th July 1826, plaintiff commenced an action of ejectment for recovery of the same premises on a demise laid 10th July 1826 for fourteen years, and a demise laid 26th December 1831 for seven years, and an ouster on 27th December 1831, and had judgment to recover his said terms; concluding with a prayer of judgment if defendant ought, during the said terms, to be admitted, &c.

Held, on general demurrer, that the replication was good:

And that a rejoinder, stating that no writ of execution was ever issued, nor had plaintiff ever had possession of the premises, but that a writ of error upon the judgment was still pending and undetermined, was bad.

The plea of liberum tenementum admits a sufficient possession of the plaintiff to support an action against a wrong doer, but denies his rightful possession, and asserts a right to immediate possession in the defendant.

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thereof, and keeping him so expelled for the time in the declaration mentioned; that the same are, and were during all the time above-mentioned, the close, soil, and freehold of defendant, &c. Verification.

3. As to breaking and entering the tithes and rectory, that the same are, and were during all the time &c., the freehold of defendant, &c. Verification.

Replication to the first plea, that defendant ought not to be admitted to plead the said plea, because, after the said 10th July 1826, to wit in *Trinity* term 2 *W. 4.*, in the court of our late lord the King before the King himself, *George Wright*, the defendant in this suit, by the name of *George Wright*, late of *H.* in the county of *Lancaster*, yeoman, was attached to answer *John Doe* (a), the plaintiff in this suit, wherefore the said *G. Wright*, with force and arms, broke and entered the manor of *Hornby* in the county of *Lancaster* with the appurtenances, and all the tithes arising therein; and the manor of *Tatham* with the appurtenances in the same county; and the rectory of the parish church of *Tatham* in the said county, and all the tithes within the said rectory and parish, which one *Sandford Tatham* had demised to the said *John Doe* for a term which had not then expired; and also wherefore the said *George Wright*, with force and arms, broke and entered a certain "other" manor of *Hornby* in the county of *Lancaster* (repeating exactly the same premises as before), which the said *Sandford Tatham* had demised to the said *John Doe* for a certain other term not then expired: and thereupon the said *John Doe* complained (stating a declaration in

(a) As to former proceedings between the present parties, See *Wright v. Doe dem. Tatham*, 1 *A. & E. 3.* *Same v. Same*, 7 *A. & E. 313.*; *Same v. Same*, 4 *New Ca. 489.* In 7 *A. & E. p. 336.*, line 12, for 1836 read 1837.

ejectment

ejectionment on a demise of the first-mentioned premises on *July* 10th 1826, and a demise of the secondly mentioned premises on 26th *December* 1831, for the terms of fourteen and seven years respectively, and an ouster of plaintiff by the defendant from the several premises on 27th *December* 1831, the said several terms therein, and each of them, then and at the time of the said complaint being unexpired; plea of not guilty, and issue thereon; trial at the assizes at *Lancaster*, *August*, 7 *W.* 4.; verdict for plaintiff, and judgment of the Court of King's Bench in *Michaelmas* term, 11th *November* 1836): whereby the said *John Doe* recovered against the said *George Wright* his several terms aforesaid, then yet to come, of and in the several tenements aforesaid with the appurtenances, together with his damages, costs, and charges, &c.; as by the record and proceeding thereof, remaining in the said Court of King's Bench in full force and effect, more fully appeared. Averment, that the manors of *H.* and *T.* with the appurtenances, the tithes, rectory, &c., in the declaration mentioned, were respectively the same with the manors, tithes, rectories, &c., mentioned in the said recovery, record, and proceedings, and not other or different. Prayer of judgment if defendant, *during the said terms in the said record mentioned*, ought to be admitted to the said plea, contrary to the said recovery, record, and proceedings.

Replication to the second and third pleas, that defendant ought not to be admitted to plead the said pleas or either of them, because &c. (stating the action of ejectionment on two demises, the pleadings, verdict and recovery exactly as on the replication to the first plea, with a similar averment of identity, and conclusion).

Rejoinder to the replication to the first plea; that

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the defendant ought to be admitted to plead the said plea, because heretofore, to wit on 2d *November* 1836, a writ of error was duly issued out of Chancery by defendant, to remove a transcript of the record and proceedings in the ejectment suit, mentioned in the replication, into the Exchequer chamber. That the said writ of error was duly allowed on 2d *November*, and was a supersedeas to all writs of execution upon the said judgment; and that no writ of execution ever issued at any time upon the said judgment, nor was the said *John Doe* ever in possession of the premises in the said declaration and replication mentioned, or any of them, or any part thereof. That the said record and proceedings were afterwards duly certified by the Chief Justice in a transcript annexed to the writ of error, and delivered to the justices and barons in the Exchequer Chamber; which said writ of error, at the commencement of this suit, was in the said Exchequer Chamber duly deposited with, and in the hands of, the proper officer in that behalf, and in full force and effect, and the proceedings thereon pending and undetermined; and that, *after* the commencement of this suit, to wit on &c., the said judgment was affirmed; and thereupon, to wit on &c., a writ of error was duly issued out of Chancery, reciting the said affirmance of the said judgment, and commanding the Chief Justice of the King's Bench to send the record and process of the said plaint into parliament, &c.; that the last-mentioned writ of error was afterwards duly allowed, and was a supersedeas to all writs of execution. That the record and process was afterwards, to wit on &c., duly certified, together with the said writ, to the Queen (after the demise of the late King) in parliament; as by the same, in the hands of the proper officer of parliament
in

in that behalf, reference being had thereunto, will fully and at large appear; and which said last-mentioned writ of error is now in full force and effect, and the proceedings thereon pending and undetermined. Verification and prayer of judgment that defendant ought to be admitted to plead, &c.

Similar rejoinders to the replications to the second and third pleas.

General demurrers to each of the rejoinders; and joinder in demurrer.

At the sittings in Banc in last *Hilary* vacation (a), 1st *February*, the demurrers were argued by

Cresswell, for the plaintiff. The questions raised upon the record are, whether the recovery in ejectment be pleadable as an estoppel, in reply to the pleas of *liberam tenementum*, and "not possessed:" whether the effect of the estoppel is defeated by the pendency of a writ of error: and, whether the plaintiff must have been put into actual possession by entry, or writ of *habere facias possessionem*, before he can maintain an action for mesne profits.

The replication is supported by an authority expressly in point, *Nares v. Lewis*, of which the record is found in *Brownlow's Entries*, tit. *Trespass* (b), and in the Appendix to *Richardson's Practice of the Common Pleas*, vol. ii. p. 256. (4th ed. p. 440.). The original record has been examined and found to correspond with the entries. It was an action of trespass against *Elizabeth Lewis* for mesne profits from 2d *October*, 32 *Car. 2.*, to 4th *March*, 35 *Car. 2.* The defendant pleaded that she entered by command

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Walton.

(a) Before Lord Denman C. J., Littleale, Williams, and Coleridge Js.

(b) *Brownlow Latin Redivivus*, p. 493. (ed. 1693.)

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of persons who were seised in fee of the premises, and gave express colour to the plaintiff. The plaintiff replied, by way of estoppel, that he had, in *Hil. 32 & 33 Car. 2.*, brought an action of *ejectione firmæ* against the defendant and others on a demise to him of the same premises by *B. G.* for the term of five years on 1st of *October 32 Car. 2.*; that defendants had pleaded Not guilty, on which issue was joined, which was found for the plaintiff, who thereupon had judgment to recover possession of his term. To this replication the defendant demurred. Judgment was given in the Common Pleas for the plaintiff; and the judgment was afterwards affirmed on error in this Court. The only difference between the two cases is, that the defendant there gave express colour; here the possession is traversed in one plea, and *implied* colour is given by the other plea of *liberum tenementum*. The law of estoppel is clearly stated in the judgment of Lord *Ellenborough* in *Outram v. Morewood (a)*: “a recovery in any one suit, upon issue joined on matter of title, is equally conclusive upon the subject matter of such title;” and “a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession.” His Lordship then cites a case from *Leonard (b)*, where the defendant, in an action of trespass *quare clausum fregit*, pleaded a former recovery in an *ejectione firmæ* brought by himself against the plaintiff for the same land, and the plea was held to be an estoppel, for that the possession was bound by the recovery. So here the right of possession has been determined between these parties,

(a) *3 East*, 346. See p. 354.(b) *Anon. 3 Leon.* 194.

and

and the defendant can no longer dispute it by either of his pleas. *Trevivan v. Lawrance* (a) also illustrates the law of estoppel, and explains some apparently discordant authorities by shewing under what circumstances the jury are bound by an estoppel.

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Then does the pendency of a writ of error alter the case? Until actual reversal, the judgment is in full force, and the replication is strictly true in every part. If it be reversed, the plea of course becomes false, and the estoppel fails; but in the mean time the possibility of reversal cannot affect the present validity of the judgment. Thus debt lies on a judgment pending a writ of error brought upon the same judgment; *Year-Book*, 18 Ed. 4. f. 6. B. pl. 33.; *Dighton v. Granvil* (b). It was said in the latter case that a writ of error is not pleadable, even in abatement, to a scire facias upon a judgment. If, then, it will not suspend the effect of a judgment, à fortiori it is no bar to it. The same point was decided in *Snook v. Mattock* (c) and *Godwin v. Goodwin* (d). In *Donford v. Ellys* (e) the Court refused to stay proceedings in an action for mesne profits, pending error in the action of ejectment; and rightly, for the plaintiff's remedy should not be put in peril by the contingency of the death of parties, or of witnesses, or other accidents which may occur during the delay. It is true that the writ of error is a supersedeas of execution; but that is only by the practice of the courts, and not by any rule of law; for the courts will sometimes permit execution to be issued, as where the writ of error appears to be brought for delay; *Kempland v. Macau-*

(a) 1 *Salk.* 276.(b) 4 *Mod.* 247.(c) 5 *A. & E.* 239.(d) 20 *Vin. Abr.* 69. *Supersedeas* (B) pl. 12.(e) 12 *Mod.* 138. *S. C.* as *Tonford v. —*, *Comb.* 455.

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ley (a). *Meriton v. Stevens* (b), and *Taswell v. Stone* (c), also shew that this practice is founded on the equity of the Court. Nor will any inconvenience follow from the reversal of the judgment in ejectment, for the defendant may be relieved, either by applying to this Court to stay execution, or by a writ of *audita querelâ*.

The objection that the plaintiff has not obtained actual possession, or sued out a writ of *habere facias possessionem*, is entitled to no weight; for the plaintiff in ejectment may have a right to the profits without the possession. If the plaintiff had been tenant per autre vie, and the life had dropped, he could not have obtained possession, but would have had a right to the mesne profits. In the old action of *ejectione firmæ*, where the plaintiff sued for his term and damages, he might have damages without the term: 7 *Ed.* 4. 6. (d), cited *Bro. Ab. Quare ejecit infra terminum*, &c., pl. 6., *Peto v. Checy* (e). So, in the modern action of ejectment, when the term expires, the plaintiff may have damages without possession; *Thrustout dem. Turner v. Grey* (g), *Doe dem. Morgan v. Bluck* (h). So, in the analogous case of a writ of waste, the plaintiff may be entitled to damages, where he cannot have the place wasted; *Co. Lit.* 285 a.

Wightman, *contra*. The replication is no estoppel. It is no answer to the first plea denying the plaintiff's possession, because the recovery and judgment in eject-

(a) 4 *T. R.* 436.(b) *Willet*, 271.(c) 4 *Burr.* 2454.(d) See *Doe dem. Poole v. Errington*, 1 *A. & E.* 750.; p. 756., and note (a), *ibid*.(e) 2 *Brownl. & G.* 128.(g) 2 *Str.* 1056.(h) 3 *Camp.* 447.

ment

ment did not vest the possession in the plaintiff, but only entitled him to obtain it by a writ of possession, which was never sued out. The rejoinder distinctly states that no execution ever issued, and that the plaintiff never was in possession of the premises. The consent rule no doubt confessed the possession, but that is no part of the record. If, then, the plaintiff has not been in actual possession since the recovery in ejectment, this action, which is founded on possession, will not lie. It would, indeed, have been enough, if the plaintiff had been let into possession voluntarily by the defendant; *Calvert v. Horsfall* (a); but possession is at all events essential. *Fenwick v. Grosvenor* (b) illustrates the principle. *Doe v. Huddart* (c) only decides that the record of a recovery in ejectment is not conclusive evidence of title in an action for mesne profits; though it was certainly intimated by the Court that, if it be available at all by way of estoppel, it must be specially replied.

Then, as to the plea of liberum tenementum, there is this additional difficulty, that the plaintiff sets up his judgment to recover a term as an answer to a claim of the freehold. The plea and the replication are therefore not *ad idem*. The defendant may be estopped from denying that the plaintiff is entitled to a term; but a term or lease to the plaintiff, though pleadable in reply by way of confession and avoidance of a claim of freehold, cannot *estop* the defendant from asserting such claim. [*Littledale J.* The term is not derived from the defendant, but a third party, whose title has been established as against the defendant.] It does not appear whether the title of both the lessor and the plaintiff

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(a) 4 *Esp.* 167.(b) 1 *Salk.* 258.(c) 2 *C. M. & R.* 316.

may

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may not have been derived from the defendant ; but, at all events, the plaintiff established nothing but a right to recover a term, which is consistent with the title pleaded by the defendant. *Taylor dem. Atkyns v. Horde* (a) settles the principle of the modern action of ejectment, and shews that the judgment is " a recovery of the possession (not of the seisin or freehold), without prejudice to the right, as it may afterwards appear, even between the parties." He who enters under it can only be possessed " according to the right " (b). A judgment in ejectment cannot be pleaded at all, in any shape, either by the defendant or the plaintiff, in a second action of ejectment for the same land. It is not even evidence in a second action. If, indeed, a plea of liberum tenementum had been pleaded to the action of ejectment, and the issue on it found for the plaintiff, he might then have replied it by way of estoppel in this action. [Coleridge J. The verdict and judgment shew a right of possession in the plaintiff: the plea of liberum tenementum asserts a right of possession in the defendant: has not the plaintiff a right to say, " this question has already been settled between us in the former action ? "] The estoppel must be of something directly in issue. Here the right to the freehold is alleged. In ejectment, the right to the possession alone was determined. The precedent cited from *Richardson's Practice* is unsatisfactory, because no grounds of the judgment appear in any report of the case ; nor are the pleadings exactly the same, for the plea there states a seisin in fee, and an actual possession of the persons so seised, by entry. The issue, therefore, went to the possession.

There are further objections to the replication. The

(a) 1 Burr. 60. 114.

(b) Id. p. 144.

declaration

declaration complains of an expulsion, and appropriation of the mesne profits from 10th *July* 1826 down to the commencement of the suit. The replication alleges a recovery on two demises, one on 10th *July* 1826 for fourteen years, the other on 26th *December* 1831 for seven years. In this there is repugnancy as well as uncertainty. The recovery of the last term of seven years only shews a possession or right of possession on 26th *December* 1831, and is therefore no answer to so much of the pleas as denies possession, or right of possession, during the period between that time and *July* 1826. [Coleridge J. The judgment is for recovery on both terms.] Estoppels are to be construed strictly; and the plaintiff ought to shew on which of the terms he relies. Besides, in point of form, although the premises, included in the two demises, are the same in name, viz., the manors of *H.* and *T.*, yet they are alleged in the declaration in ejectment to be "other" manors and premises. It is, therefore, not clear that the replications cover the whole period to which the pleas apply. The pleas apply to the period between *July* 1826 and the commencement of this suit. The recovery in ejectment, without actual entry, at most only estops the defendant from denying possession for the period mentioned in the declaration in ejectment, and the replication is, therefore, not co-extensive with the first plea. That declaration asserts a possession under the first demise from 1826 till ouster in 1831, which is inconsistent with the continued expulsion of the plaintiff from 1826, as alleged in the present action.

Supposing, however, that the replication is good, the pendency of a writ of error is an answer to it. It would, indeed, be a singular state of the law, if a judgment should

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should be held conclusive, the validity of which is actually in question in a court of error. The effect of the rejoinder is, not to deny the existence of the judgment, but to stay its operation during the pendency of the writ of error. Any averment may be made in answer to an estoppel, which does not impugn the record, and which only goes to the operation of it; *Hynde's Case* (a). That the Court may interfere in a summary manner, is no reason why the defendant should not also avail himself of the same matter by plea; and convenience is in favour of the practice. The case chiefly relied on is *Dighton v. Granvil* (b), which is not reported with sufficient clearness to be entitled to much weight. Some of the reasoning, attributed to the Court in it, is at variance with the judgment stated to have been given; and the decision seems to have gone on technical grounds. [*Littledale J.* referred to *Com. Dig. Pleader* (2 W. 36.).] One distinction between this and the cases cited on the other side is that, at common law, there was no remedy to recover on a judgment after a year and a day, except by action; so that, if the defendant could delay execution by a writ of error for more than a year, he might defeat the judgment altogether. A judgment, until affirmed, ought to be no estoppel, on the same principle that a verdict, until judgment, is inadmissible as evidence; *B. N. P.* 234. Pendency of error is often pleadable. Thus bail cannot be fixed, pending error; and they may plead it in bar of a scire facias on the recognisance; *Sampson v. Brown* (c). The sheriff, who executes a fi. fa. after notice of allowance, is liable in trespass, and the writ of error may be

(a) 4 Rep. 71 b. cited 10 Vin. 421. *Estoppel* (A) 12.

(b) 4 Mod. 247.

(c) 2 East, 439.

replied

replied to a justification under such *fi. fa.*; *Belshaw v. Marshall (a)*. In *Rowley v. Raphson (b)* a writ of error was considered pleadable in bar of execution on a *scire facias*. In *Curling v. Innes (c)* the surety of a judgment debtor was allowed to plead the pendency of a writ of error on the original judgment. The hardship on the defendant will be very great, if the rejoinder is disallowed; for there will be no effective remedy by *auditâ querelâ*, if the judgment should be reversed; and the plaintiff is an ideal person, by whom the defendant cannot be reimbursed, and who can give no security for costs.

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Cresswell, in reply. If the possibility of reversal were to be admitted as an objection to using the judgment, it would be no estoppel, even though there were, in fact, no writ of error pending at all. In *Belshaw v. Marshall (a)* the writ of error was well pleaded; for the writ of execution was superseded by it without reference to the validity of the judgment, and the plaintiff had no other remedy. *Curling v. Innes (c)* only shews that a surety is not damnified so long as the judgment remains unexecuted. *Reynolds v. Beerling* in the note to *Evans v. Prosser (d)*, is an authority to shew that a judgment is available as a set-off, after error brought upon it. The passage alluded to in *Hynde's Case (e)* only means that the operation of an estoppel may be defeated by shewing that the judgment is reversed, or that the parties are not the same. If the judgment should be

(a) 4 D. & Ad. 336.

(b) *Skin*. 590. See observations on this case in *Snook v. Mattock*, 5 A. & E. 239.

(c) 2 H. Bl. 372.

(d) 3 T. R. 168.

(e) 4 Rep. 71 b.

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reversed, an *audita querelâ*, which is an equitable, remedial, writ, will afford a complete remedy, as well between parties to the record as others who are interested in it: note (1) to *Turner v. Davies* (a).

As to the necessity of entry or execution by *habere facias possessionem*, the plea of Not guilty either denies or admits the entry alleged in the declaration. If it denies it, the verdict falsifies the plea and estops the defendant; and in either case, the entry and possession are established as against him. The possession and ouster, alleged in this action, are the same as those stated in the action of ejectment, and neither are now to be disputed. *Nares v. Lewis* (b) is distinguished from this case only by the statement of a seisin in fee with express colour. The pleas of *liberum tenementum* and seisin in fee are put on the same footing in *Leyfield's Case* (c); and neither of them requires express colour, because they are not inconsistent with a possession by the plaintiff: *Taylor v. Eastwood* (d). The plea of *liberum tenementum* admits an actual, but not a rightful, possession in the plaintiff, and asserts a right of possession in the defendant. The judgment in ejectment shews a rightful possession in the plaintiff, and is therefore inconsistent with, and an answer to, the plea. That *liberum tenementum* denies a rightful possession, is clear from the practice, before the late rules of pleading, of giving it in evidence under Not guilty. That the judgment in ejectment implies a rightful possession, and that ejectment is, in this respect, distinguishable from trespass, is shewn by *Graham v. Peat* (e). [Lord

(a) 2 *Wms. Saund.* 148.

(b) 2 *Richardson's P. C. P.* 256. (4th ed. p. 440.)

(c) 10 *Rep.* 89.

(d) 1 *East*, 212.

(e) 1 *East*, 244.

Denman C. J. A judgment is no bar to any number of other ejectments by the same party for the same premises.] That peculiarity in ejectment arises from the facility of varying the title of the plaintiff by alleging a different demise, or a demise on a different day, so that the title may be always made to appear different. But, if the second declaration exactly resembled the first, the judgment would then be pleadable. If the declaration in this case had stated the recovery in ejectment, then the pleas of *liberum tenementum*, or of *Not possessed*, would have been demurrable; *Kemp v. Goodall (a)*, *Palmer v. Ekins (b)*.

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With respect to the argument that the replication does not answer the whole of the plea, it is enough to say that the plea does not answer the whole of the declaration. If the defendant is estopped as to any part, he has no right to apply his plea to the whole. The judgment is inconsistent with his plea as to part, and the whole plea is therefore shewn by the replication to be bad. Until the new rules of pleading, the practice was to plead *Not guilty*, and the judgment was then conclusive evidence of the plaintiff's title. Since the new rules, pleas, which distinctly challenge the plaintiff's title, are put on the record; and it has therefore become necessary to reply the estoppel. The rule laid down in the *Duchess of Kingston's Case (c)* is not at variance with the later decisions in *Vooght v. Winch (d)*, *Magrath v. Hardy (e)*, and *Doe v. Huddart (g)*. They are reconciled by holding a judgment to be conclusive as *evidence*, where the party, who relies on it, has no opportunity of pleading it; and inconclu-

(a) 1 *Salk.* 277.(b) 2 *Str.* 817.(c) 20 *How Sta. Tri.* 538. note.(d) 2 *B. & Ald.* 662.(e) 4 *New Ca.* 782.(g) 2 *C. M. & R.* 316.

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sive, where the party elects to refer when he might have pleaded the e

Lord DENMAN C. J. now delivered the Court.

This was an action for mesne profits of the 13th of *June* 1837, was in 1 laid an entry on the manors of and other premises, and expulsion 1826; the latter continued to till the action. Several pleas were will now be necessary to consider plaintiff's possession; the other p mentum of the defendant during declaration mentioned. To each plaintiff, by way of estoppel, referred in an action of ejectment brought the demise of *Sandford Tatham* & Two demises were laid, on the fourteen years, and on the 26th seven years, with a single ouster 1831. The plea of Not guilty, the recovery, by judgment, of the two tenements with an allegation that the judgment was void for want of force; and the replications, having of the premises so recovered with this declaration, conclude with proof by the defendant, during the said term mentioned, ought to be admitted contrary to the said recovery, record,

The validity of this replication

(a) See *Coles v. The Bank of England*

tioned, independently of the rejoinder, and may be conveniently disposed of first. With regard to both pleas, that which denied the plaintiff's possession and that which asserted the defendant's freehold, the question will be, whether it discloses that those pleas seek to draw again into controversy the very point (or right) decided in the former suit. If they do, upon the plainest principles, it concludes the defendant from pleading them. And this principle was not denied in the able argument for the defendant, but only its application to the present record.

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1st. As to the plea which denied the plaintiff's possession. Two terms, it was said, are shewn to have been recovered in the ejectment; one commencing 10th *July* 1826, for fourteen years; and one on 26th *December* 1831, for seven years. The ouster is laid on the 27th *December* 1831, and no possession appears to have been given under the judgment. But the judgment itself in ejectment does not give the possession; only the right to it by entry, or writ of habere facias possessionem. The plea, therefore, and the replication, are not inconsistent; and it appears by the whole record that the plaintiff has not, in fact, the possession.

This reasoning, we think, is not sound. The plea, being pleaded to the whole declaration, must be taken, on the assumption of its being a good plea, to deny any such possession in the plaintiff as was necessary for his bringing the action at all. But, in order to bring the action, all that could be necessary, on the strictest construction, would be a possession when the alleged trespass was committed. That therefore, at least, must be taken to be denied by the plea. But the record in ejectment shews, conclusively as between these parties,

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a lease of the 10th *June* 1826, an session till the ouster in *Decembe* therefore, and the replication, are and the former seeks to re-agitate which the latter shews to have been former action. The defendant's argument proceeded on the assumption that it was plaintiff to have actual possession at *this action*. And there are, no doubt not cited in the argument, which should not bring trespass with a continuance disseisin before re-entry, because the disseisor for the whole time after that, after re-entry, he should have continued from the disseisin to the same authorities state that for the disseisin the action lay before re-entry several instances where the disseisor entry by the act of God or the estate, in which he had the action was *Co. Litt. 257 a.*, and *2 Roll. Ab.* seems to us however not important in this inquiry, because the question is whether the plaintiff can recover damages which we say nothing, but whether "possessed" must not, at all events, which the trespass charged was committed it must, and therefore, being inconsistent at least, with the judgment set out the defendant is estopped from pleading.

It was urged indeed that, viewing this way, it was open to another objection not extend so widely as the plea; but

plea might refer to the time of the cause of action accruing, it also refers to the time of the commencement of the action; and, as to this last, the replication, shewing no re-entry, was no estoppel. But we think this objection received a sufficient answer at the bar. The plea is pleaded to the whole, and it is enough for the plaintiff to shew that it cannot be pleadable to that. The first plea therefore seems to us to be sufficiently answered.

2dly. In support of the second plea it was said that there was nothing inconsistent in the allegation of the freehold being in the defendant with the recovery of a term for years by the plaintiff; for it may be, for example, that both the plaintiff and his lessor are termors under the defendant.

In order to estimate the weight of this argument, it is necessary to settle what is the true meaning of *liberum tenementum*; what it admits; and what it denies.

Now, as it is pleaded in answer to a possessory action, it must admit a possession in the plaintiff, or it would be bad, as amounting to the general issue. It must admit such a possession as would suffice to maintain the action if unanswered, or as against a wrong doer. On the other hand, it must deny a rightful possession, or it would fail as a defence to the action. In the language of pleading, it gives implied colour to the plaintiff, but asserts a freehold in the defendant with a right to immediate possession. In an ordinary case, therefore, such a plea is answered by replying a term of years in the plaintiff created by the defendant, which shews that the plaintiff's possession is not merely colourable, but rightful; or, where the declaration has been sufficiently

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explicit, by taking issue on the liberum tenementum, and so shewing the defendant to be a wrong doer.

Now, in the present case, the replication shews that, as between these parties, it has been decided that the plaintiff is a termor, not indeed under the defendant, but under one whose title is paramount to his; that the possession therefore is a rightful one, and that the defendant has no right to immediate possession: but this is inconsistent with the limited admission of the plea and the title set up by it, taken together. And therefore we think the defendant was estopped from such plea.

Mr. *Cresswell* cited, in support of the replications to both pleas, the case of *Nares v. Lewis*, which is to be found in 2 *Richardson's Practice*, 256 (4th ed. p. 440.), and *Brownlow's Entries*, 493; and he has procured us a transcript of the whole record from the treasury, the judgment not appearing in *Brownlow*. The declaration was in trespass, and for the mesne profits. The plea set out a title in the defendant in fee, giving express colour to the plaintiff. The plaintiff replied, by way of estoppel, the proceedings in a former action of *ejectione firmæ* against the defendant and others, in which judgment had passed for him to recover his term in the same premises; but, as in the present case, the replication said nothing of any re-entry, or delivery of possession. The rejoinder maintained the title in the plea, to which there was a general demurrer, and after several continuances it appears that judgment passed for the plaintiff. Substituting a freehold for a fee simple, this case is precisely the same as the present as far as regards the point already considered, and is an authority in support of our opinion.

The

The replications being good by way of estoppel, the remaining question is, whether the rejoinders avail to destroy their effect; and these allege the pendency of a writ of error on the original judgment in the House of Lords; and we are clearly of opinion against the defendant on this point. The authority cited by Mr. *Cresswell* from the *Year-Book*, 18 Ed. 4. f. 6 B. pl. 33., is very direct and satisfactory; and to this, and other cases cited at the bar, may be added those of *Taswell v. Stone* (a) and *Benwell v. Black* (b), because they illustrate the distinction taken between the mere maintenance of the action on a judgment, pending a writ of error to reverse it, and the proceeding to execution upon a judgment recovered in such second action; in the former case, the Court being clear that there was no reason to set aside the judgment, but thinking it highly proper to stay any proceeding to execution upon it.

Upon the whole, therefore, we give judgment for the plaintiff.

S.

Judgment for the plaintiff.

(a) 4 Burr. 2455.

(b) 3 T. R. 643.

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Saturday,
June 22d.

UTHER *against* RICH.

To assumpsit on a bill of exchange, drawn by defendant, indorsed by him to *H.*, and by *H.* to plaintiff, defendant pleaded that he indorsed in blank, and never delivered the bill to *H.*, but delivered it to *L.*, who, till *H.* became possessed, held it for the sole use of defendant, and for the specific purpose that he, *L.*, should get it discounted for, and pay the proceeds to, defendant; that *L.*, fraudulently and covinously, in violation of good faith, and contrary to the said purpose, delivered the bill to *H.*, and *H.* took it, without discounting for defendant, contrary to the said purpose, and in breach and violation thereof, towit for the purpose and under colour and pretence of securing an alleged debt from *L.* to *H.*; that *H.* was not a bonâ fide holder for value or consideration, and that plaintiff was not at any time a bonâ fide holder for value or consideration; and that defendant never had received consideration or value from *L.*, or *H.*, or plaintiff, or any other, for the indorsing or payment of the bill. Replication de injuriâ.

Held that, on this issue, the question as to plaintiff was, whether he gave any value for the bill, and that, if he did, he was entitled to the verdict, though the circumstances of the fraud alleged might in other respects be true, and the plaintiff privy to them; for that the denial of his being a bonâ fide holder for value, as here worded, did not raise the question of his privity to the fraud,

ASSUMPSIT on a bill of exchange, dated 27th September, 1836, for 300*l.*, at twelve months after date, drawn by defendant on Lord *Arthur Chichester*, payable to order, and indorsed by defendant to *John Hunter* and by *John Hunter* to plaintiff: averment that the drawee did not pay at maturity, and that defendant had notice. Breach, non-payment by defendant.

Second plea. That the indorsement of the said bill in the declaration mentioned, by defendant, was an indorsement in blank, and that defendant never delivered the bill to *Hunter*, but that he delivered the same to one *Lewis Levy*, and the said *Lewis Levy* then received, and, from thence until *Hunter*, as hereinafter mentioned, first became possessed thereof, held the same, for a specific purpose, for the sole use and benefit of defendant, and not otherwise, towit for the purpose and in order that *Levy* might get the bill discounted for defendant, and deliver and pay the proceeds thereof upon such discounting to defendant. Averment that *Levy*, fraudulently and covinously, in violation of good faith, and contrary to the said purpose for which he received the said bill, afterwards, towit on &c., delivered the bill to

Hunter,

Hunter, and *Hunter* then took and received the same from *Levy*, upon other and different terms, and without discounting the same for defendant, and contrary to the said special purpose, and in breach and violation thereof, towit for the purpose, and under colour and pretence, of securing a certain debt then alleged to be due from *Levy* to *Hunter*. That "*Hunter* was not at any time a bonâ fide holder of the said bill of exchange for value or consideration in that behalf given, and also that the plaintiff was not at any time, nor now is, a bonâ fide holder of the said bill of exchange for value or consideration in that behalf given;" that defendant never hath received any consideration or value whatsoever from *Levy* or *Hunter*, or plaintiff, or from any other person whatsoever, for the indorsing or for the payment of the bill by him the defendant. Verification.

Replication, De injuriâ, and issue thereon.

There were other issues of fact.

On the trial before Lord *Denman* C. J., at the *Middlesex* sittings after *Hilary* term, 1837, it appeared that *Levy*, mentioned in the plea, was introduced to the drawer (defendant), and the drawee, as a person who could raise money for them, and it was agreed that defendant should draw upon the drawee, and indorse, and the drawee should accept, bills to the amount of 1800*l.*, which *Levy* should get discounted. The bills, including that on which the present action was brought, were drawn, indorsed, and accepted accordingly, and handed to *Levy*; but neither the drawer nor drawee received any money for them; and *Levy* afterwards returned several of the bills. *Levy* handed the bill now sued upon to *Hunter*, receiving for it from him 75*l.* in cash, and two acceptances for 25*l.* each. *Hunter*
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indorsed the bill to the plaintiff, a gunsmith, from whom he received guns for it, said to have been estimated, between them, at 150*l.*, and an acceptance for 150*l.* which was afterwards paid. *Hunter* afterwards sold the guns for 50*l.* to a pawnbroker. Upon this and other evidence, the defendant's counsel contended that the plaintiff was privy to a fraud on the drawer and drawee, and therefore was not a bonâ fide holder for value: but the Lord Chief Justice told the jury that, upon the issue on the second plea, their verdict must be for the plaintiff, if they believed that he had really given any value for the bill. Verdict for the plaintiff on all the issues.

In *Easter* term, 1837, Sir *W. W. Follett* obtained a rule for a new trial, on the ground of misdirection as to the issue on the second plea, and of the verdict being against evidence on one of the other issues. In *Michaelmas* term last (a),

Platt and *Knowles* shewed cause. It is not disputed that *Hunter* gave some value to *Levy* for the bill; and, therefore, unless the issue upon the second plea raise the question of fraud, it must be found for the plaintiff. The question might have been raised, but is not. It will be said that the words "bonâ fide" do put in issue the honesty of the transaction; but the allegation in the plea is, that the plaintiff was not a bonâ fide holder for value. Now it is true that, at one time, the principle was adopted that a party taking a bill is bound to use due diligence in inquiring whether the party

(a) *Monday* and *Tuesday*, November 19th and 20th, 1838. Before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

giving

giving it has come by it fairly; *Gill v. Cubitt* (a), *Down v. Halling* (b), *Beckwith v. Corral* (c). But those cases are now overruled; *Goodman v. Harvey* (d). Illegality or fraud, since the new pleading rules, must be distinctly put on the record, that the plaintiff may know specifically what is charged, and may answer the allegation in terms. That a party was not bonâ fide holder for consideration may be evidence of fraud: but it is not in itself fraud; just as "gross negligence may be evidence of mala fides, but is not the same thing;" per Lord Denman C. J. in *Goodman v. Harvey* (d). Fraud, therefore, is not here averred. In *Bramah v. Roberts* (e) it was held that, where a plea alleged that the holder knew a bill to have been fraudulently negotiated and no value given for it, the holder might reply generally that he had no knowledge of the fraud, and that the bill was indorsed to him for a valuable consideration. That case shews the proper way of raising and meeting the defence. There the language of the replication (independently of the denial of notice) was that the "bill was indorsed and delivered to the plaintiffs fairly and bonâ fide, and for a good and valuable consideration;" and this averment *Tindal* C. J. treats (g) as simply an allegation that there was good consideration for the indorsement. The defendant here, on the second issue, might have shewn that the consideration was merely colourable, as in *Devas v. Venables* (h): but he could not go into any other question of fraud.

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(a) 3 B. & C. 466.

(b) 4 B. & C. 330.

(c) 3 Bing. 444.

(d) 4 A. & E. 870.

(e) 1 New Ca. 469.

(g) Page 478.

(h) 3 New Ca. 400.

Sir

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Sir *W. W. Follett* and *W. H. Watson*, *contra*. If the plea does not raise the question of fraud with sufficient distinctness, there should have been a special demurrer. [*Patteson J.* The question is, whether the allegation that the plaintiff was not a *bonâ fide* holder for value is an allegation of fraud on the part of the plaintiff: if it be, evidence of the fraud was receivable: if it be not, no demurrer was necessary, the plea presenting only a denial of the consideration.] The words "*bonâ fide*" mean *in the fair and ordinary course of business*; if a value be given in bad faith, the party does not become a *bonâ fide* holder for value. Before the new pleading rules, privity to the fraud would have been a good defence under non assumpsit, whether value was given or not. *Gill v. Cubitt* (a) and similar cases went too far, because there more than *bona fides* was required, namely, reasonable diligence. In *Bayley on Bills*, p. 471. (5th ed.), it is said, "In many cases the plaintiff is compellable to prove that either he or some preceding party took the bill or note *bonâ fide*, and for value; As, in case of a bill or note originally given without consideration, and whilst the person giving it was under duress: Or in case of a bill or note obtained by fraud: Or in case of a transfer by delivery by a person not entitled to make it: As, in the instance of bills or notes which have been stolen or lost." *Bayley J.*, in *Gill v. Cubitt* (a), adopts the criterion of Lord *Mansfield* in *Miller v. Race* (b): "Here is no pretence or suspicion of collusion with the robber: for this matter was strictly enquired and examined into at the trial; and is so stated in the case, 'that he took it for a full and valuable consideration, in the usual course of business.' Indeed if there had been

(a) 3 B. & C. 466.

(b) 1 Burr. 452. See p. 458.

any

any collusion, or any circumstances of unfair dealing; the case had been much otherwise." That suggests the true question, and shews what "bonâ fide" means in cases of this kind. Here the jury ought to have been left to find the "collusion," if they thought the facts warranted it. So far, the doctrine laid down in *Gill v. Cubitt* (a) has never been overruled. In *Lawson v. Weston* (b) there was no collusion set up; there can be no doubt that Lord *Kenyon* would have considered that a defence. Lord *Tenterden* may, in *Gill v. Cubitt* (a), have gone too far in over-ruling that case; but it is consistent with the doctrine for which the plaintiff here contends. In *Backhouse v. Harrison* (c) *Patteson J.* distinctly adhered to the old law on this point: and it was not impeached in *Crook v. Jadis* (d) or *Goodman v. Harvey* (e). As to the onus of proof, it is thrown on the plaintiff if the defendant has shewn some fraud or some defect of that nature in the plaintiff's title; *Mills v. Barber* (g). The words "bonâ fide" have been used by the legislature; and in *Devas v. Venables* (h) it was held that the words "payments really and bonâ fide made," in sect. 82 of the Bankrupt Act, 6 G. 4. c. 16., "imported something different from and additional to an actual payment; that the words *bonâ fide* were inserted by the legislature to raise the question, whether the money has been paid honestly and fairly in the course of an honest transaction, and that that question ought not to be left out of the consideration of the jury." This agrees with Lord *Tenterden's* view in *Ward v. Clarke* (i).

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(a) 3 B. & C. 466.

(b) 4 Esp. 56.

(c) 5 B. & Ad. 1098.

(d) 5 B. & Ad. 909.

(e) 4 A. & E. 870.

(g) 1 Mee. & W. 425. S. C. Tyrwh. & Gr. 835.

(h) 3 New. Ca. 400.

(i) Moo. & M. 497.

(The .

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(The question as to the effect of evidence was also argued; and the Court held that there must be a new trial on this point. See the judgment, post.)

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

This was an action by the indorsee against the drawer of a bill of exchange. The second plea stated that the bill had been drawn and indorsed to *Levy* for a special purpose, who, in fraud of that purpose, had handed it to *Hunter*, and that *Hunter* handed it to the plaintiff, *not for good and valuable consideration, and that the plaintiff was not the bonâ fide holder*. The replication was *de injuriâ*. At the trial, I held that these pleadings put in issue nothing but the fact of a consideration having been given, and that the defendant was not at liberty to shew that the plaintiff knew of the fraud, but should have pleaded that knowledge in distinct terms.

On the motion for a new trial, other points were disposed of; and the only question now remaining is, what meaning is to be given to the words in the plea, that the plaintiff was not the bonâ fide holder of the bill.

With respect to the doctrine laid down in *Gill v. Cubitt* (a) and other cases, we adhere to the more recent decisions, and to what is said in *Goodman v. Harvey* (b), that gross negligence alone would not be a sufficient answer; that it may be evidence of mala fides, but is not the same thing. It follows that, in pleading, mala

(a) 3 B. & C. 466.

(b) 4 A. & E. 870.

fides must be distinctly alleged; and the sole question is, whether mala fides is alleged by the words "that the plaintiff was not the bonâ fide holder of the bill." The case of *Devas v. Venables* (a) is not in point; for that was a decision upon the meaning of the words "bonâ fide" in a particular act of parliament, which was construed with reference to the subject-matter and the context. Neither is the case of *Bramah v. Roberts* (b) an express authority, as the decision turned on other words in the plea. And the question does not appear to have arisen in any other case.

Now the words in question must be taken with reference to the other allegations in the same plea; and, being so taken, their proper meaning would seem to be, that the plaintiff was merely a collusive holder, not really interested in the bill himself, but only lending his name to *Hunter*; and then they do not go beyond the allegation that he had not given good and valuable consideration, evidence of which was admitted. But it is contended that their meaning is, that the plaintiff took the bill under such circumstances that he must be considered to have known of the fraud set forth in the plea. We do not see how such a meaning can fairly be attributed to them; and are of opinion that the only proper mode of implicating the plaintiff in the alleged fraud by pleading is to aver *that he had notice of it*, leaving the circumstances by which that notice is to be proved, directly or indirectly, to be established in evidence: and we cannot treat the allegation, that the plaintiff was not bonâ fide holder, as equivalent to such an averment.

(a) 3 *New Ca.* 400.(b) 1 *New Ca.* 469.

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It is not necessary to give an opinion on any supposition that the words could be taken without reference to the other allegations in the plea ; but we wish it to be understood that we by no means intend to say that, even if taken simply, they would have any other meaning than that which we have now given to them.

The rule for a new trial has been already granted on the ground that the verdict was against evidence : but, as the Court think that the direction was quite right, the rule must be upon payment of costs.

Rule absolute for new trial, on payment of costs.

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IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

JOHN FRANCIS, Lord HOWDEN, *against* Sir JOHN
SIMPSON, Knight, and Others.

DEBT on an agreement under seal between plaintiff and defendants. The agreement, as set forth in the declaration and upon oyer, recited the formation of a company

An agreement under seal, between plaintiff and defendants, recited: That a company had been formed for making a

railway; that defendants were proprietors; that a bill had been introduced into parliament, according to which the line would pass through plaintiff's estates and near his mansion, and that he was a dissentient and opposed the passing of the bill; that defendants had proposed that, if he would withdraw his opposition, and assent to the railway, they would endeavour to deviate the proposed line: and plaintiff agreed that, on condition of the stipulations in the agreement being performed, he did thereby withdraw his opposition and give his assent: and defendants covenanted that, in case the then bill should be passed in the then session, they would, in six months after it received the royal assent, pay plaintiff 5000*l.* as compensation for the damage which his residence and estates would sustain from the railway passing according to the deviated line, exclusive of, and without prejudice to, further compensation to plaintiff in the event of the deviated line not being ultimately adopted, and without prejudice to such further compensation, for any damage, as in the agreement after mentioned.

Plaintiff declared in debt, and averred that he withdrew his opposition to the bill, which passed into a law in the then session, that six months had since elapsed, but that defendants had not paid the 5000*l.*

Plea, that the railway, at the time of making the agreement, and according to the act, was intended to pass through lands of divers individuals; that the agreement was made privately and secretly by the parties thereto, without the consent or knowledge of the said individuals, and was concealed from them continually until the act was passed, and was not disclosed to, or known in, parliament, and was concealed from the legislature, during the passing of the act; and that plaintiff, at the time of passing the act, and still, was a peer of parliament. On demurrer,

1. Held, in Q. B., that the plea was good, as shewing that the contract was a fraud on the legislature.

Judgment reversed in the Exchequer Chamber, because the record did not distinctly shew that the parties, at the time of the contract, meant it to be concealed. *Quære*, whether, if such intention had been shewn, the plea would have been good?

Held also, in the Exchequer Chamber,

2. That no fraud on the individual landholders appeared, it not being distinctly shewn that concealment from them was intended at the time of the contract. *Semble*, that, even if this had appeared, there was no fraud on the landholders.

3. That the agreement was not bad on the ground of plaintiff being a peer, since it was not shewn that the money was promised as a consideration for his vote being given or withheld, and he had a right in his individual character to bargain for compensation for injury to his land. But that, if it had appeared that the money was so promised, the action must have failed.

Defendants also pleaded that, after making the agreement and before action brought, the company abandoned the deviated line, and in lieu thereof adopted another line, alto-

gether

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gether out of plaintiff's lands; that they had petitioned parliament to be allowed to carry the railway along the new line, and were then making every exertion in their power to procure an act for that purpose; and that, if they should obtain such act, no part of the railway would pass through plaintiff's lands.

4. Held, in Q. B., on demurrer, that the plea was no answer.

a company for making a projected railway, called "The York and North Midland Railway Company;" that defendants were four of the proprietors, and that a bill had been introduced into parliament for making such railway; that the line thereof, according to such bill and the maps and plans deposited, would pass through the estates and near the mansion of the plaintiff; that plaintiff, considering it would be an injury to his estates, was a dissident from the undertaking, and opposed the passing of the bill; that defendants, in their individual capacities and not merely as proprietors, had proposed that, if plaintiff would withdraw his opposition to the bill and assent to the railway, they would endeavour to deviate the line proposed in the map or plan deposited for the purposes of the said bill, and would endeavour to carry such deviated line in the direction shewn upon a map annexed to the agreement, so as to leave the proposed original direction at a certain point B, and return to it at A; and that, in case the bill then in parliament should pass into law in the then session, defendants should be bound by the further stipulations and agreements in the deed contained. The count further stated, that, on condition of such stipulations and agreements being performed, plaintiff did, by the said deed, withdraw his opposition to the bill and give his assent thereto; and defendants did thereby jointly and severally covenant and agree with plaintiff that they would apply, during the then next session of parliament, for, and endeavour to obtain, an act to enable them to deviate their line as proposed; and furthermore that, in case the present bill then in parliament should pass into law within the then present session, then defendants, or some or one of them, or their executors,

executors, &c., or the said company, should and would, within six calendar months after the act for constructing the railway according to the line proposed in the then present bill should receive the royal assent, pay to plaintiff the sum of 5000*l.* as or towards compensation for the damage and detriment which his residence and estates would sustain from the railway passing according to such deviated line, exclusive of, and without prejudice to, further compensation to be made to him in the event of the deviated line not being ultimately adopted, and without prejudice to such further compensation to him or his tenants for any such damage or injury as thereafter expressed; and, in case the said bill then in parliament should, within the then present session, be passed for making the railway according to the present plan, then defendants, or some or one of them, or the company, should and would, in the then next session, apply and use their best endeavour for obtaining an amended act for deviating the line of the railway; and, in case defendants, &c., could not obtain such amended act during the then next session by reason of a dissolution or other inevitable obstacle, or, in that case, during the next following session, then defendants, &c., should, within three calendar months after the amended act should have passed in the then next or following session, as the case might be, or, in the event of such act not being obtained, within three calendar months after the attempt to obtain it should have failed, pay to plaintiff, as part of his personal estate, an additional sum above 5000*l.*, to be fixed by certain referees therein named, by way of compensation for damage which plaintiff's residence and estate would sustain by the railway passing otherwise than according to the

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deviated line, exclusive of, and without prejudice to, further compensation to plaintiff and his tenants for any such damage and injury as thereafter expressed. The agreement contained further stipulations to pay the plaintiff 100*l.* per acre used for the purposes of the railway, and to pay to him and his tenants such further compensation, for damage or injury sustained during the progress of the works, as certain referees should fix. The declaration then averred that plaintiff withdrew his opposition to the bill in pursuance of the agreement, and that the original bill passed into law during the then session of parliament; but that, although upwards of six months had elapsed, defendants had not paid the said sum of 5000*l.*, or any part thereof.

Pleas, (after oyer). 1. That, after the agreement made, and before suit commenced, towit on &c., the company of proprietors resolved to abandon, and did altogether abandon, the said deviated line, the direction of which is in the said agreement mentioned to be shewn upon the map annexed to the said agreement; and, in lieu thereof, did then resolve to adopt, and did then adopt, another line for their said projected railway, in lieu of the said deviated line mentioned in the said agreement, and eastward thereof; which said newly adopted line, as being eastward of the said deviated line in the said agreement mentioned, entirely missed and is altogether out of the lands, tenements, and hereditaments of the said plaintiff, and every part thereof; and that the said company, towit on &c., presented a petition to parliament to be permitted to carry the said projected railway along the newly adopted line, and are now making every exertion in their power to procure an act of parliament for carrying the same
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along the said newly adopted line; and that, if they shall succeed in obtaining the said act, no part of the projected railway will pass through the lands, &c., of the plaintiff, or any part thereof. Verification.

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2. That the projected railway, in the agreement mentioned, at the time of making the agreement was intended to pass through, and, according to the act in the declaration mentioned, is intended to pass through, lands of divers individuals; and that the said agreement was made and entered into privately and secretly between the parties thereto, and without the consent or knowledge of the individuals through whose lands the said railway was so intended to pass, and was concealed from them continually until the said act was passed; and that the agreement was not disclosed to, or known in or by, the said parliament in and by which the said act was so passed as aforesaid, and that the same was concealed from the legislature during the passing of the said act. And defendants further say that plaintiff, before and at the time of making the agreement, was, and still is, a peer of this realm (a). Verification.

Demurrer to the first plea, for that it did not appear in or by that plea whether the company abandoned the deviated line therein mentioned before or after the passing of the act of parliament in the agreement and declaration mentioned; that the money stipulated to be paid by defendants was to be paid at all events within six months after the passing of the act, and that it was no answer, in point of law, that, after the agreement

(a) It was objected to this plea that it did not allege the plaintiff to be a peer of parliament; but, as the Court expressed an inclination to permit an amendment in this respect, it was agreed at the bar that the argument should proceed as if the necessary amendment had been made.

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made and the act passed, the company thought fit to abandon the line. Joinder.

There was also a general demurrer to the second plea, and joinder.

The demurrers were argued in the Court of Queen's Bench in last *Michaelmas* vacation (a).

Cresswell for the plaintiff. As to the first plea, the making of the road is not a condition precedent to the payment of the money. The consideration for the payment was the plaintiff's consent to the adoption of the original line proposed by the bill. The defendants entered into an absolute engagement to pay the money at a fixed day after the passing of the act; and no alteration in the plans of the defendants or of the company can now relieve them from their obligation. Suppose the defendants had agreed to pay the plaintiff a sum on a certain day in consideration of a grant by the plaintiff to them of a right of way, would it be any defence to an action for the money that the defendants had since released their right to the way? The payment is independent of the actual making of the road; and the case is within the principle of *Pordage v. Cole* (b), and the law stated, in note (4) to that case, by Mr. Serjt. *Williams* (c). The plea does not even shew that the company have yet obtained the necessary powers for changing the line. [He then proceeded to argue the demurrer to the second plea; but, as the same cases, with some exceptions noticed hereafter, were cited, and

(a) November 28th, 1838. Before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

(b) 1 Sand. 319.
 per curiam

(c) 1 Wms. Sand. 320.

the points upon this plea more fully discussed, in error, this part of the argument has been here omitted.]

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Sir *F. Pollock*, contra. As to the first plea, the whole agreement has obvious reference to some line that shall pass over the plaintiff's land. The payment is "as or towards compensation for the damage and detriment" which the residence and estates of the plaintiff will "sustain from the railway passing according to such deviated line." The company have wholly abandoned the deviated line, and every other line passing over the plaintiff's property; and an act has since passed to remove it far away from the property (*a*). A new state of things has arisen, from which it is clear that the defendants can have no benefit from the agreement, and the plaintiff suffer no detriment to his estate. The case resembles the second class mentioned in note (4) to *Pordage v. Cole* (*b*), namely, where, though the day of payment is fixed, the consideration fails before the day arrives. If performance fails, or becomes impossible, before the day of payment, as where the consideration is the appointment to an office which is abolished by parliament before the day, no action lies for the money. [The rest of the argument is omitted for the reasons already mentioned.]

Cresswell, in reply, was stopped by the Court, as to the first plea.

(*a*) Stat. 7 W. 4. & 1 Vict. c. lxviii. (local and personal, public). See post, p. 814, note (*a*). This act was passed 30th June 1837; the plea was pleaded, 15th February 1837. It was noticed by *Cresswell* that the act (sect. 27) recognised and confirmed the contracts made under the preceding act.

(*b*) 1 Wms. Saund. 520.

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Lord DENMAN C. J., in *Hilary* term (*January 31st*), 1839, delivered the judgment of the Court.

This case was argued in the sittings after last term upon demurrer to the pleas. [After stating the declaration, his Lordship continued as follows.]

To this declaration, after setting the agreement out on oyer, the defendant first pleaded a plea which we thought bad for reasons assigned during the argument.

More difficult and more important questions arise upon the second plea. This plea seeks to avoid the deed on three several grounds. First, that the railway at the time of making the agreement was, and by the bill now passed is, intended to be carried through the lands of divers individuals, and the agreement was entered into secretly without their knowledge. Secondly, that the agreement was not known to parliament, and was concealed from the legislature during the passing of the act. And, lastly, whatever might be the character of such an agreement if made between the defendants and any other than a peer or member of the legislature, that the plaintiff's quality as a member of the Upper House, and the duties incumbent on him as such, made it at all events an illegal agreement for him to enter into, and one which he cannot enforce. This plea is demurred to generally; and it was contended, in the argument, that on neither of these grounds could the agreement be impeached. We think that, the plea and agreement being taken together, an answer to the declaration is disclosed,

disclosed, on the ground that the latter had in contemplation that which was inconsistent with material allegations in the preamble and provisoes in the clauses of the intended bill, and that to conceal such an agreement from the legislature was in the eye of the law a fraud upon it, and any contract founded on such concealment contrary to good faith.

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Whether an agreement of this sort, apart from the accident of concealment, must be necessarily invalid in itself, we need not decide. A state of things may perhaps be easily imagined, in which, from new information obtained after the first line had been applied for, it would become just, as well as expedient, to substitute another for it. But the question is, whether such a change can lawfully be made during the progress of the bill, by a secret compact between the future company and certain individuals. Now the line by which a railway is to pass is at the very root of the whole project. Alter that line, fresh notices, fresh plans, fresh consents become necessary. Had the proposed deviation been introduced into this bill, it could not, under ordinary rules, have passed in that session. Suppose then that this agreement had been disclosed to parliament, is it clear that the bill would have been allowed to pass in its present state? On the contrary, is it not at least equally probable that some such objection as the following might have prevailed? "You come to us for powers which you do not mean to use; you offer evidence in support of the preamble, and desire us to find it proved, when it is at the same time clear, from your own deliberate agreement, that another line is preferred and intended to be adopted by you; if you are not as yet in a condition to ask us to legislate on that line, it is fitting that we should

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should suspend legislating altogether, until we can have your whole plan before us at once." Now, if it is in any degree reasonable to suppose that the legislature might have proceeded on such grounds as these, we think it clear that the agreement ought to have been disclosed, and that to conceal it was a legal fraud, because it was concealing that which might have made the decision other than it was. Acts of this kind, it is well known, are to be considered as bargains between the public and the parties applying for them, and the legislature represents the public in framing them; it is essential, therefore, that nothing be knowingly kept back which may reasonably be expected to have an influence on the judgment of the legislature in so framing them as to secure for the public the best terms in return for those powers over private property, and other advantages, which the act is to confer on the parties applying. Upon principle, therefore, we are of opinion that this agreement, under the circumstances of concealment disclosed by the plea, cannot be enforced. But it has been twice under the consideration of a court of equity; and two other cases in equity, supposed to bear upon the point, were cited in the argument: it is necessary for us, therefore, to see how the point stands upon authority. The present defendants, it seems, filed their bill praying, among other things, that this agreement might be declared to be void, and delivered up to be cancelled, and the present plaintiff enjoined from proceeding in this action. The bill was demurred to generally for want of equity: in the argument before Lord *Langdale*, the same three objections to the agreement were insisted on, as this plea discloses: the judgment proceeded entirely on the second, the same which we have been considering;

considering; and upon that ground Lord *Langdale* said, he saw very strong reasons to think that, when the proper time came for deciding it, the contract might be considered and held to be illegal; he, therefore, overruled the demurrer: *Simpson v. Lord Howden* (a). This decision, however, was reversed, on appeal, by the Lord Chancellor, *Simpson v. Lord Howden* (b), not upon grounds which impeached the reasoning or opinion of the Master of the Rolls, but upon a point which he had disposed of in a very few words, that the objections made to the agreement were all apparent on its face, and available in a court of law, and that there was no instance in which a court of equity had given relief under such circumstances. Some expressions, however, are reported to have fallen from his Lordship from which it may be probably inferred that he at that time considered the reasoning of the Master of the Rolls as inconclusive; but there is nothing which approaches even to a formed opinion on the subject.

Two other cases were cited. The first is, *The Vauxhall Bridge Company v. Earl Spencer* (c). The subject of discussion, there, was an agreement made before the passing of the *Vauxhall Bridge* Act, between the projectors and the trustees of the *Battersea Bridge*: clauses to indemnify the latter for losses which they might sustain by the erection of the new bridge had been introduced into the bill, but they were objected to on the second reading in the Lords, and the bill was in consequence withdrawn. This agreement was then secretly made, by which a sum of money was to be secured, and ultimately made payable to the proprietors

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(a) 1 *Keen*, 583.(b) 3 *Myl. & Cr.* 97.(c) 2 *Madd.* 356.; and, on appeal, *Jac.* 64.

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of the *Battersea Bridge*, in lieu of the indemnity intended to have been given by the clauses in the bill. These were then expunged, and the bill presented and passed without them. It is unnecessary to notice some difference of facts which exists between the two cases, because it does not affect the ground of the Vice-Chancellor's (Sir *T. Plumer's*) decision, which directly applies to the present question. He says (a), "The legislature and the public must have supposed the claim of compensation was given up, and that the money to arise from the tolls was to be applied as the act directs, and not in discharge of the money secured by this secret agreement. If the compensation had been publicly insisted upon, the legislature might have passed the bill without regarding the claim, or if they thought it a proper claim, might have refused to pass the bill, on the ground that the satisfaction of the claim would be too great a burthen upon the undertaking. The object of the agreement was to prevent an opposition to the bill in parliament, and it was to be concealed from the legislature. Such an underhand agreement was a fraud upon the legislature, and contrary to principles of public policy. The contract was invalid." The decree, however, which his Honor pronounced after this strong expression of opinion, did not *decide* on the invalidity of the bonds given in pursuance of the agreement, but left that to be tried at law. There was an appeal, and Lord *Eldon* (b) affirmed the decree. In the course of his judgment, however, he is reported to have made some remarks from which it appears that, in the view which he took of the facts, he doubted of the soundness of Sir *T. Plumer's* reasoning. But it is

(a) 2 *Mad.* 367.(b) *Jac.* 64.

remarkable

remarkable that, as he stated them, he seems not to have adverted to that circumstance of purposed concealment from the legislature on which Sir *T. Plumer* had laid so great stress, and that he certainly supposes a state of things before the Lords, on the second reading, very different from that alleged in the plaintiff's bill and admitted by the demurrer. By the bill, it appeared that several Lords "entertained objections," especially to the clauses in question, "on the ground that such a contract was illegal and contrary to public policy, being founded on an improper principle, and was likely to operate as a bar to the general improvement of the country" (a). This Lord *Eldon* is made treat as "something that fell from some member of the committee," as an imagination "that scruples would be entertained;" and an objection, made by one member of the committee, "not sanctioned or known by the House at large" (b). With all the respect which we unfeignedly feel for the decisions of that most able and cautious judge, we are compelled to say that the reasoning which he is stated to have used, even on his own view of the facts, appears to us to be wholly inconclusive. "It is argued," he says, "that this was a fraud upon the legislature, but I think it would be going a great way to say so, for *non constat*, if it had been pushed to the extent of taking the opinion of the House, that it might not have passed the bill in its former shape." But, if the House might have *refused* to pass it in that shape, which is *à priori* equally supposable, and which the particular circumstances alleged make more probable, and if they were the constituted judges to determine whether they would or no, and, still further, if the parties applying

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for their decision knowingly withhold from them material facts, we are at a loss to understand how the possibility of a decision the same way, even with those facts apparent, removes the imputation of fraud, or the objection on the score of public policy.

One case remains to be noticed, that of *Edwards v. The Grand Junction Railway Company* (a). The facts of that case, so far as they bear on the present point, were these. The line of an intended railway was to cross a turnpike road. The trustees opposed the bill, and prepared a petition to the Lords against it. Subsequently a meeting took place, and clauses were agreed on to be introduced into the bill, which were satisfactory to the trustees, and on the faith of which they agreed to withdraw their petition. It was then suggested, on the part of the railway, that, as the introduction of the clauses into the bill would occasion delay and expense, the trustees should accept an agreement embodying their substance in lieu of them. This was yielded to, and the bill passed without them. The question was whether this agreement was binding; and both the present Vice Chancellor and Lord Chancellor held that it was. That case, however, is obviously distinguishable from the present. In the first place the bill, as it passed, contained nothing inconsistent with the stipulations in the agreement, a circumstance relied on by the Lord Chancellor in his judgment. Secondly, if the clauses had been inserted, the opposition of the trustees, who were alone interested in them, would, *ex concessis*, have been equally withdrawn; and then, the only parties interested assenting, the bill would have passed according to the usual course of the legislature with such bills under the same circumstances; but, as the

(a) 1 Myl. & Cr. 650.

agreement

agreement was to effect the very thing which the clauses would have provided for, it is impossible to say the legislature were imposed upon by it. This case, therefore, is not in point to one where the agreement between the parties and the enactments of the bill are opposed to each other. It, in fact, decided no more than this, so far as it bears on our present inquiry, that an agreement to make a particular bridge or viaduct of not less than fifty feet in width, in consideration of withdrawing opposition to a bill, one clause of which restricted the company from making any bridge or viaduct less than fifteen feet wide, might be binding.

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It appears, then, that the conclusion to which we have come is sanctioned by the judicial opinions of Sir *T. Plumer* and Lord *Langdale*; and that there is no decision, nor any clear expression of an opinion, the other way. We think there is great weight in the objection which arises to the validity of this contract from its being kept secret from the parties interested, who had given their assent to the bill which enacted a different line, and might either have withheld their assent at first, or withdrawn it and opposed the bill afterwards, if they had known of the intended deviation. But the view we have already explained renders any remarks on that, or the remaining point in the case, unnecessary.

We are, upon the whole, of opinion that the second plea is good, and there must be

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Judgment for the defendants.

The plaintiff brought a writ of error in the Exchequer Chamber, on the judgment upon the second plea. The case was argued in this vacation, *Tuesday, June 18th*,

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Cresswell for the plaintiff in error (the plaintiff below). None of the points made for the defendants in the court below can be supported.

First, it was contended that Lord *Howden*, being a peer of parliament, could not legally make a pecuniary contract respecting the passing of a legislative measure. It was not denied that any individual, not a member of parliament, might accept a compensation for abandoning his opposition to a measure which injured him; and no reason can be assigned for depriving a peer of such a right. It is not a recognised principle that a member may not vote in cases affecting his interests; if it were, no landowner could vote on the question of the corn laws, no proprietor of Bank or East India Stock on a question relating to the charters of the Bank or *East India Company*. But, further, it is not to be assumed that Lord *Howden* would give any vote at all on this question; that is not contemplated in the agreement, nor is he compellable to do so; and he does not agree to support the measure, but only to withdraw his opposition. He might, besides, cease to oppose in the character of a landowner, as other landowners might, by not instructing any agent to appear against the bill, and yet be free to decide either way, in his legislative capacity, upon a view of the public good or evil which the measure appeared to him likely to produce.

Secondly, it was objected that, as the line was to pass through the land of other persons, it was a fraud on them to make this agreement without their knowledge. But they had no right to be privy to any terms which

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an individual landowner might choose to make with the company. If there was any obligation to communicate such a bargain to the other landowners, it was incumbent on the defendants: the plaintiff entered into no express or implied contract or understanding with any other landowners.

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Thirdly, it was objected that this agreement was not made known to parliament at the time when the act was passed. Now the agreement is between the plaintiff and the company; and the plaintiff has never done any thing imposing upon him the necessity of communicating with parliament at all. The course in such transactions is, in fact, for parties to announce to the committees of the houses that they have agreed; but parliament does not interfere with the terms of such agreements. It is contended that, inasmuch as the agreement provides for a future deviation, the legislature was deceived, and the plaintiff was a sharer in the deceit, because the parties had in contemplation to represent one line as the best to parliament, and then construct another. This view seems to have been partly sanctioned by Lord *Langdale M. R.*, in *Simpson v. Lord Howden (a)*, where a bill was filed by the present defendants, praying to have the agreement delivered up to be cancelled, and a demurrer to the bill was over-ruled. But Lord *Howden* was no party to any misrepresentation; he simply assents to a proposal that he shall give up his interests in the company's favour, on condition of a certain compensation and of an alteration to be obtained, if possible, which is to lessen the injury done to him. The not communicating such an agreement to

(a) 1 *Keen*, 583.

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strangers cannot make it illegal unless it be illegal in itself: and *The Vauxhall Bridge Company v. The Earl of Spencer* (a) shews that withdrawing opposition to a bill may be a good consideration for payment to be made in compensation. Possibly, if the contract had provided for positive concealment, the objection would have been more specious. *Catlin v. Bell* (b) and *Hodgson v. Temple* (c) shew that a bargain respecting goods may be enforced by a party who knew that the other party intended to smuggle them. [Tindal C. J. Not if the bargain is to effect that.] That distinction is in favour of the plaintiff. Lord Langdale's decision in *Simpson v. Lord Howden* (d) was reversed by Lord Cottenham C.; *Simpson v. Lord Howden* (e). The Lord Chancellor there threw doubt upon the doctrine laid down by the Master of the Rolls on the point now under discussion; but he reversed the judgment, it is true, upon a distinct point. Suppose this contract had been made before the act was applied for, what pretence would there have been for treating it as a fraud on parliament? But what difference can it make that the contract was not concluded till the bill was in parliament, the terms being the same? Or, again, suppose the act had passed before any contract had been made, and afterwards, upon Lord Howden claiming compensation before a jury, the parties had agreed to give him 5000*l.*, and attempt to obtain a fresh act authorising a deviation. That transaction would have been free from the objection now made, yet the situation of all parties would have been the same as

(a) *Jacob*, 64.(b) 4 *Campb.* 183.(c) 5 *Taunt.* 181.(d) 1 *Keen*, 583.(e) 3 *Myl. & Cr.* 97.

it is now. It can make no difference whether the money be to be paid immediately, or six months after the royal assent shall have been given. Indeed, the record does not shew that the bill was before parliament at the time of the contract. No objection can arise upon the ground of public policy; the general policy of the law is, that any owner of property shall make such terms respecting the abandonment of any of his rights as may seem fit to himself and the other contracting party. Further, supposing the contract vicious, so far as regards the deviation, the other terms, which contain simply an abandonment of Lord *Howden's* rights for a consideration, may well stand. "If some of the covenants of an indenture, or of the conditions endorsed upon a bond, are against law, and some good and lawful," "the covenants or conditions which are against law are void *ab initio*, and the others stand good;" *Pigot's Case* (a). The same rule as to conditions void by the common law is to be found in *Norton v. Simmes* (b) and *Mosdel v. Middleton* (c). It is true that if part of the consideration of a promise be against law the whole contract is void; *Featherston v. Hutchinson* (d); but here the question arises as to distinct parts of the promise itself. *Gaskell v. King* (e), *Wigg v. Shuttleworth* (g), *Howe v. Synge* (h), illustrate this point. [Maule B. In those cases the illegality consisted in contracting not to claim deductions in respect of the property-tax; stat. 46 G. 3. c. 65. s. 115. enacted that "all contracts, covenants, and agreements made or

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| (a) 11 Rep. 26 b, 27 b. | (b) Hob. 12. See p. 14. (5th ed.). |
| (c) 1 Vent. 237. | (d) Cro. Eliz. 199. |
| (e) 11 East, 165. | (g) 13 East, 87. |
| (h) 15 East, 440. | |

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entered into, or to be made or entered into for payment of any interest rent or other annual payment aforesaid in full, without allowing such deduction as aforesaid, shall be utterly void." The particular covenant, &c., was all that the words of the statute reached.] *Kerrison v. Cole* (a), *Chesman v. Nainby* (b), *Newman v. Newman* (c), are also illustrations of the general distinction. [*Tindal* C. J. mentioned *Mouys v. Leake* (d).] If the legal and illegal contracts depend one upon the other, the law no doubt is the other way; but that is not so here. [*Parke* B. If I sell a horse to a man who agrees to give me 50*l.* and steal another horse, am I enforcing an illegal bargain by suing for the 50*l.* ?]

Joseph Addison, contra. The answer to the question just put would depend upon the fact, whether the horse was given for the 50*l.* and the promise to steal, or whether the promise to steal was altogether an independent matter, and the horse was sold for the 50*l.* only. In the latter case, an action might be brought for the 50*l.*, not in the former; but the case here resembles the former. The plaintiff withdraws his opposition, and gives "his assent," on condition of the stipulations in the agreement being performed. Now the agreement contains a stipulation that the defendants will endeavour to obtain an act authorising them to deviate. And the covenant of the defendants is that, if the "present bill" be passed in the then session, they will pay the plaintiff 5000*l.* for compensation in respect of the railway as made on the deviated line, exclusive of other possible damages. It

(a) 8 *East*, 231.

(b) 2 *Str.* 739. *S. C.* 2 *Ld. Raym.* 1456. *S. C.*, in error in *Dom. Proc.*, 1 *Bro. P. C.* 234. (2d ed.).

(c) 4 *M. & S.* 66.

(d) 8 *T. R.* 411.

cannot

cannot be said that the deviation is not a part of the contract mixed up with the whole. If the line made according to the deviation be illegal, the 5000*l.* cannot be recovered; for it is to be paid for the damage done by that line.

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In answer to the first objection it is contended that the plaintiff had a right to bargain as to his own land, although he was a peer. But the objection is that he is selling his vote. [*Erskine J.* The dissent may be merely in the character of an individual.] He contracts, not merely to withdraw his opposition, but to "assent:" if he had voted against the bill, that would have been a breach of the contract (*a*).

In answer to the second objection, it is said that any party interested may individually get the best terms which he can. But, if the whole be part of a common scheme, as a railway, a secret bargain by one such party is a fraud on the rest. [*Tindal C. J.* You would compare it with a deed of composition, where the law will not permit one creditor secretly to get better terms than the others.] It is an analogous case. If the other parties had known of these terms, they would themselves have probably made their bargains differently. [*Erskine J.* It is not averred that any one was to know what any other gave. It is not like a case of underwriters subscribing the same policy: each may have assented on different terms. *Parke B.* Under a deed of composition, each creditor is supposed to receive the same terms, and no one would join if he were told that the debtor meant to make separate bargains with each.] All parties

(*a*) On this point, Sir *F. Pollock* cited, in the Court below, *Gilbert v. Sykes*, 16 *East*, 150., and the words of Lord *Mansfield* in *Jones v. Randall*, *Cowp.* 37, 39.

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are together before parliament. The agreement is like a bargain for giving a creditor money to induce him to sign a certificate. Besides, the other parties here assent upon the belief that the railway is to follow the line preferred in the original bill, which (sect. 46) prohibits a deviation, except within small limits (a). Their consent is not stipulated for in the agreement; and it is not only possible, but highly probable, that they would have opposed the original bill had they been made acquainted with this bargain. When they have to oppose the new bill their situation is altered. The bargain is, in effect, for the misapplication of the funds.

Lastly, the transaction is a fraud on the legislature, who are trustees for the public. It is a secret agreement to obtain the consent of parliament on the supposition that a line is to be followed, which it is intended to abandon. *The Vauxhall Bridge Company v. The Earl of Spencer* (b) has been cited to shew the legality of such a bargain. That case came first before Sir *Thomas Plumer*, V. C.; *Vauxhall Bridge Company v. Earl Spencer* (c); and his Honor held the agreement to be illegal. But afterwards, when the answers were put in, the concealment from the legislature, and agreement to conceal, were contradicted; and in that shape the case, *The Vauxhall Bridge Company v. The Earl of Spencer* (b), came before Lord *Eldon* whose language, therefore, cannot apply to this case. Lord *Cottenham's* judgment

(a) The act is stat. 6 & 7 W. 4. c. lxxxi. (local and personal, public), "for making a railway from the city of *York* to and into the township of *Altofts*, with various branches of railway, all in the West Riding of the county of *York* or county of the said city." See stat. 7 W. 4. & 1 Vict. c. lxviii. (local and personal, public), "to alter the line of the *York and North Midland* railway, and to amend the act relating thereto."

(b) *Jacob*, 64.

(c) 2 *Madd.* 356.

in *Simpson v. Lord Howden* (a) decides nothing as to the principle now in question; and Lord *Langdale's* opinion, in the previous case of *Simpson v. Lord Howden* (b), is expressly in favour of the defendants. In *Edwards v. The Grand Junction Railway Company* (c) a private agreement to cease opposing the bill, in consideration of some advantages in addition to those given by the act, was considered not to be illegal on the ground of injustice towards shareholders who were ignorant of the agreement. But there, as Lord *Cottenham C.* pointed out, the advantage, which was the construction of a bridge wider than those which the company were compelled to make by the act, was consistent with it: here the contract is for a line inconsistent with the original bill.

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Cresswell, in reply. The 5000*l.* is not given for the damage done by the intended deviation. Lord *Howden*, in consideration of withdrawing his opposition, is to receive 5000*l.* at any rate; and more if the deviated line be not adopted.

As to the word "assent," it relates merely to the proof required by parliamentary committees respecting individual landowners.

Cur. adv. vult.

TINDAL C. J., in this vacation (3d *July*), delivered the judgment of the Court.

In this case a writ of error has been brought on a judgment of the Court of Queen's Bench on a demurrer to a plea. Lord *Howden*, the plaintiff below, brought an action against the defendants upon a covenant con-

(a) 3 *Myl. & Cr.* 97.

(b) 1 *Keen*, 583.

(c) 1 *Myl. & Cr.* 650.

tained

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tained in a deed, by which, after reciting that a bill had been introduced into parliament for making a railway intended to pass through the estates, and near the mansion, of the plaintiff, and which the plaintiff thought likely to be injurious thereto, and therefore he was a dissentient from the undertaking, and was about to oppose the passing of the said bill, the plaintiff agreed, on condition of the stipulations in the agreement contained being performed, to withdraw his said opposition to the bill, and assent to the railway; and the defendants, four of the proprietors of the intended railway, agreed, in case the said bill should be passed into a law within the then session of parliament, to give 5000*l.* to the plaintiff towards compensation for the damage he would sustain, within six months after the passing of the act; and also agreed that they would, in the next session of parliament, apply for, and use their best endeavours to obtain, an amended act, for making a deviation from the line of the railway in a particular direction. The deed contains many other stipulations, not material to be adverted to; but it is to be observed that there is none which expressly states, or from which it can be implied, that the agreement, or any part of it, was to be kept secret. The declaration on this deed alleges that the act passed, and that six months had since elapsed, and that the money was not paid.

The first plea states that the company of proprietors had abandoned the proposed line, and in lieu thereof resolved to adopt another, which entirely avoided the lands of the plaintiff; and had presented a petition to parliament for, and were using every effort to obtain, an act of parliament for carrying it into effect.

To this plea there was a demurrer; and the Court of
Queen's

Queen's Bench held the plea to be bad. And, on the argument before us, it was not insisted that it was a good plea. It is, indeed, beyond all question that this plea affords no answer to a covenant to pay the 5000*l.* absolutely at the end of six months after the passing of the act.

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Upon the second plea, to which there was also a demurrer, the Court of Queen's Bench gave judgment for the defendants. (His Lordship here read the second plea, p. 797, *antè.*)

The objections founded on this plea were threefold. First, that the deed was a fraud on the legislature; secondly, that it was a fraud on the proprietors of lands on the line of the railway; and, thirdly, that it was void because it was against law that the plaintiff, a peer of parliament, should make a bargain which placed his private interest in conflict with his public duty.

The Court of Queen's Bench decided that the deed was invalid on the first ground, and gave no opinion upon the other two; and indeed little reliance was placed on them in the course of the argument in this Court. And we are of opinion that no one of those objections ought to prevail, and that the judgment must be reversed.

The ground upon which the deed in question was contended to be a fraud on the legislature is this, — that the plaintiff and the defendants were to be considered as having agreed together to represent to the legislature the line of road described in the then pending bill as the line which was to be adopted and acted upon, whilst, in truth, they intended at the time to apply for, and adopt, and act on, another, if obtained. This is the view which Lord *Langdale* inclined to think might ultimately

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ultimately be taken of this transaction (a). It was also argued that Lord *Howden* and the proprietors must be considered as having agreed to represent the proposed line of the road as the best for the public interests, though in reality they never meant to carry it into effect, and had a better in prospect. In either view of the case, the supposed fraud consists in an intention to make a *false* representation to the legislature, by stating the object of the adventurers to be to carry one line into effect, and concealing the design of applying for another. In both it is essential, in order to make the deed a fraud on the legislature, that the contract to apply for a new act should be intended by both parties to be kept secret from it. For, if it was to be disclosed, the idea of an intended fraud upon parliament is obviously out of the question. It is not enough that the existence of such an agreement was, at the time of entering into it, and afterwards, in fact, kept secret from the legislature and all the world besides, by both parties. The quality of the agreement, whether fraudulent or not, must depend upon the intention of the parties to it at the time of making it; and, if there did not *then* exist the intention of deceiving the legislature, by concealing from it, whilst the petitioners were asking for one set of powers, the purpose of asking afterwards for others, the agreement cannot be void, whatever imputation might rest on the conduct of the parties in making the subsequent concealment. This point appears to us to be clear; and, on looking carefully at the plea, we find that there is no averment of any such intention on the part of the plaintiff or of the defendants at the time of

(a) *Simpson v. Lord Howden*, 1 *Keen*, 583.

the

the making of the agreement, or of any intention to make any untrue statement to the legislature. It is, indeed, alleged in the plea that the agreement was secret, and was kept secret; but it is quite consistent with every averment in the plea that both parties may have been innocent of any original fraudulent understanding that the transaction should be kept secret at the time the deed was executed. As the instrument is not, upon the face of it, fraudulent, as no intention of making any false representation, or of concealing any thing, can be collected from any part of it, the facts which make it fraudulent ought to be distinctly alleged in the plea: and no such facts are alleged. The subsequent concealment from the legislature might indeed have been used as evidence to the jury of the prior intent to conceal, if that intent had been averred; but such subsequent concealment would be evidence only, and would by no means be conclusive evidence; it cannot be used to supply the want of such a distinct averment. It is not necessary, therefore, to decide whether such an intention, if it existed, would have avoided the deed, and, if averred on the plea, would have made it a sufficient answer to the declaration. Now this defect in the plea does not appear, so far as we know, to have been distinctly brought to the attention of the Court of Queen's Bench; and the judgment pronounced by that Court seems to have proceeded upon an assumption of the intention of both parties to keep the whole transaction secret.

The same observation disposes altogether of the objection to the deed on the ground that it was a fraud on the landowners. It is suggested to be a fraud, either on the ground that, if the fact of Lord *Howden* having obtained

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obtained apparently so large a compensation had been disclosed to the landowners, it would have induced them to insist on better terms for themselves, or on the ground that, if the intention not to act upon the powers given by the statute had been known to them, they might have made a different disposition of their lands. But, on either view, the intention to keep either one branch of the agreement or the other a secret from the landholders is essential to make the deed fraudulent; and no such intention is averred. If such intention had even existed, there would still be a difficulty in holding that the deed would be fraudulent on the ground that the supposed goodness of the bargain was intended to be concealed; for it would seem that each landowner might lawfully make the best agreement he could for himself with any company of projectors, just in the same manner as if a private individual, for any purpose of his own, were negotiating to purchase the land of the same persons. There is no common obligation on all the different proprietors to place themselves on the same footing, as there is in the case of a general composition with creditors, in which case there is sometimes an express, and generally an implied, agreement that all, or all who are not expressly excepted, shall share equally and derive an equal benefit from the estate of the insolvent. It is that agreement or understanding alone which imposes an obligation on each creditor to be in the same situation as another; and there seems no analogy between their situation and that of unconnected landowners.

The last objection is, that the deed was illegal, as it places the private interest and the public duty of the plaintiff, as a peer of parliament, in opposition to each other. We can have no hesitation in saying that, if
it

it were averred in the plea, and proved, that the sum of 5000*l.*, or any part of it, was really paid as a consideration for Lord *Howden's* giving his vote for, or withholding his vote against, the bill, and that the statement in the deed was in this respect a mere colour to conceal the real nature of the transaction, the deed would have been thereby rendered corrupt and illegal, and consequently void; and that no action would lie for any part of the money. But illegality is not to be presumed; it is to be alleged and proved when it does not appear on the face of the instrument itself. Though Lord *Howden* was a peer, that would not affect his right to make any bargain for the sale of his land, or for a compensation for an injury to it; if it did, a peer or member of parliament would be placed in a worse condition than any private individual. We must presume, as there is no averment to the contrary, that his quality of peer in no way affected the bargain in question, and that he was left, notwithstanding that agreement, to exercise his free judgment, and give or withhold his vote, according to his conscience, upon the measure, when it came before him in his legislative capacity. In the absence of any agreement or understanding that the vote should be given in a particular way, the mere tendency or possible effect of such a contract on the vote of a member of either house cannot be taken into consideration.

We are, therefore, of opinion that none of the objections urged by the defendants in error can prevail; that the pleas of the defendants cannot be supported in law; and that the judgment of the Court below must be reversed.

Judgment reversed.

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JOHN JOSEPH STOCKDALE *against* JAMES HANSARD, LUKE GRAVES HANSARD, LUKE JAMES HANSARD, and LUKE HENRY HANSARD.

Judgment was given in this case in the last *Trinity* term, *May* 31st.

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Held that, under stat. 3 & 4 W. 4. c. 42. s. 23., the judge at Nisi Prius might amend the record, agreeably to the evidence, by striking out the words "*for the general conveyance of passengers*" in the declaration and plea. *Evans v. Fryer*, 609.

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In 1855 B. granted a life annuity of 180*l.* to E., secured by a warrant of attorney, on which judgment was entered up, by an assignment of a pension, and by a power of attorney to receive it in payment of the annuity. A memorial of this grant was duly enrolled. In 1837 the parties, at the request of B., executed an indenture, whereby E. covenanted to accept an annuity of 150*l.* in lieu of satisfaction of the former one of 180*l.*, and B. covenanted not to redeem it for a certain period; and it was declared that the annuity deed of 1835 and all collateral securities should be securities for the payment of the reduced annuity.

Held, that the latter annuity was void, under stat. 53 G. 3. c. 141. s. 2., for want of enrolment; and the Court, upon motion, set aside, not only the annuity deed of 1837, but also that of 1835, together with the warrant of attorney and judgment thereon, and the power of attorney to receive the pension.

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Held, also, that such award was uncertain, in not specifying the value, quality, or description of fixtures to be set up by the lessee, and might be set aside by the lessor.

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Held, that the award was good, and not repugnant; for that the finding on the 3d and 4th issues must be regarded as hypothetical, and only for the purpose of determining the costs of them; and that it could not be inferred, from such finding, that there was matter in difference in respect of work done, other than the work included in the action. *Beaufort (Duke) v. Welch*, 527.

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To a penal action on 32 G. 2. c. 28. ss. 1. 12. against the sheriff for carrying a party arrested by him to a tavern, without his free and voluntary consent, defendant pleaded that he did not carry the plaintiff to a tavern without his free and voluntary consent, modo et forma. Held, on issue joined thereon, that as the plea admitted an arrest by the defendant, and as the evidence shewed the arrest to have been made by the same officer who carried the plaintiff to the tavern, there was no necessity for further connecting defendant with the act of the officer by proof of the warrant. *Quære*, whether the plea operated as a denial both of the carrying to the tavern, and of the consent; or only of the consent?

While the officer was illegally carrying the party to gaol within twenty-four hours after arrest, the prisoner, to avoid being taken to gaol, consented to go to a tavern, and there draw up an agreement for the purpose of getting discharged: Held, that a consent so obtained was not free and voluntary within the statute, and that the plea

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was properly negatived by the jury. *Barsham v. Bullock*, 23.

V. Effect.

1. Distinction between legal and illegal.

When a party is arrested in one action, he is in custody of the sheriff in all actions in which writs have been delivered to the sheriff.

But, if the first arrest be illegal, the party cannot be *detained* under other writs without a fresh arrest.

Such fresh arrest is not prevented by the custody under the former illegal arrest, if there be no collusion.

But if a sheriff's officer, having arrested without a warrant, procure, for the purpose of making the arrest good, his own name to be inserted in a warrant properly issued in an action to another officer, an arrest or detainer in this action will not warrant a detainer under a ca. sa. in another suit, which had been delivered to the sheriff before the first arrest, and no warrant issued on it: nor can the sheriff's officer resort to such last-mentioned writ to support the original arrest; but the Court will discharge the party as to the prior suit. And this, though affidavit be made negativing collusion between the plaintiff in the prior suit and the sheriff or his officer.

Quære, whether a defendant, since stat. 3 & 4 W. 4. c. 67. s. 2., can be arrested on a judgment and ca. sa., both more than a year old, and the ca. sa. having issued within a year of the judgment, without a scire facias. *Collins v. Yewens*, 570.

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Held, on special demurrer, that the plea was bad for not shewing that the complaint had been dismissed upon one of the grounds specified in sect. 27.; and, *semble*, the certificate itself ought to shew the ground of dismissal. *Skuse v. Davis*, 635.

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BAILIFF.*

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And a sheriff's officer, taking more, was liable to the penalty under stat. 32 *G.* 2. c. 28. s. 1. 12., though appointed, by the plaintiff in the original cause, a special bailiff for making the arrest. *Plevin v. Prince*, 494.

III. Of liberty.

1. What is a mandate.

In an action against the bailiff of the liberty of *P.* in the county of *Y.* for the escape of a prisoner in execution, the declaration alleged a mandate by the sheriff of *Y.* to the defendant "as chief bailiff of the liberty of *P.* or his deputy," to take *W. T.* if found in his liberty, &c. The instrument produced in proof of the averment was in the form of a common sheriff's warrant, and was addressed by the sheriff to the keeper of the county gaol, "the chief bailiff of *P.* his deputies and *J. D. my bailiffs*," and commanded them, jointly and severally, to take *W. T.* if found "in my bailwick," &c., "that I may have the bodies," &c. The deputy of the defendant thereupon arrested and conveyed *W. T.* to the county gaol out of the liberty.

Held, that the averment was not proved; for that the precept was not a mandate to defendant as bailiff of a liberty, but a warrant to him as sheriff's bailiff, and acted upon as such; though it was shewn that defendant, when ruled by plaintiff to return "the mandate," had obtained time to do so, and had not then set it up as a common warrant.

Per *Patteson J.* A bailiff of a liberty, when addressed in the mandate as the sheriff's bailiff, may waive his franchise and act upon it in the latter character.

In such an action the plaintiff is not estopped by the sheriff's return of cepi corpus to the writ of ca. sa. *Jackson v. Hill*, 477.

2. Waiver by, 477. *Antè*, 1.

3. Estoppel by conduct, 477. *Antè*, 1.

BANK OF ENGLAND.

Liability of, 437. *Stock*.

BANKRUPT.

I. Petitioning creditor.

Depositions used by him, when evidence against him, 464. *Post*, V.

II. Act of bankruptcy, evidence of, 464. *Post*, V.

III. Bankrupt.

Evidence of his thereby ceasing to be director of a company, 113. *Partner*, II.

IV. Reputed ownership, 90. *Estoppel*, I. 2.

V. Actions, &c. by assignees.

Amendment by joining official assignee, 169. *Scire Facias*, II.

VI. Evidence.

Depositions.

Where a petitioning creditor, having ascertained that an agent in his service could prove an act of bankruptcy, sent him for that purpose to be examined on the opening of the fiat. Held, that the deposition then made was evidence of the act of bankruptcy as against such creditor in an action against him by the assignees, in which the act of bankruptcy was put in issue. *Gardner v. Moult*, 464.

BARON AND FEME.

I. Feme.

1. Incompetency, 619. *Evidence*, II. 5.

2. Removability of her children, 417. *Poor*, IX. 2.

3. Authority to employ an attorney, 47. *Post*, III.

II. Articles of the peace, 47. *Post*, III.

III. Separate maintenance: for what husband continues liable.

If

If a husband living separate from his wife, and allowing her a maintenance, uses such violence towards her that she is obliged to exhibit articles of the peace against him, she may employ an attorney for that purpose at his expense.

And if such attorney sues the husband for his costs, the Court will not enquire whether or not the wife could have paid them out of the maintenance, without resorting to the husband. *Turner v. Rooks*, 47.

BASTARD.

Filiation, 423. *Poor*, XVI.

BAWDY HOUSE.

p. 188. *Notice*, II. 2.

BEER.

Acts regulating sale, 11. *Conviction*.

BELIEF.

Bona fide, 582. *Bona Fides*, I.

BILL OF EXCEPTIONS.

To opinion of judge as to assessment of reasonable fine, 245. n. *Copyhold*, III. 2.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. What is one, and what is not.

Promise in writing as follows:—

"I agree to pay *D.* 69*l.* at four instalments, viz. the first on," &c. "being 200*l.*;" and so on, specifying three others, the four amounting to 600*l.*; "the remainder 95*l.* to go as a set-off for an order of *R.* to *T.*, and the remainder of his debt owing from *D.* to him."

Held, not a promissory note, for such note must be entire, and this instrument contained a promise to pay, joined with an agreement for something else. But

Held good evidence of an agreement to pay, in consideration of being found indebted on a statement of account, though no consideration was expressly

stated on the instrument itself. *Davies v. Wilkinson*, 98.

II. Accommodation.

What is an acceptance for plaintiff's.

Plaintiff having promised to indemnify *G.* against the consequence of a bail-bond into which *G.* had entered at plaintiff's request, and *G.* being forced to make a payment in consequence, it was agreed between plaintiff and defendant that plaintiff should obtain the money by discounting a bill drawn by plaintiff and accepted by defendant.

Plaintiff sued defendant on the bill; and defendant pleaded that it was accepted for plaintiff's accommodation.

Held, that a jury might find for defendant on this issue, although plaintiff was not liable on his promise to indemnify, it not being in writing. *Cresswell v. Wood*, 460.

III. Consideration.

1. Usurious, when protected, 675. *Usury*.

2. Valuable, 784. *Post*, VIII. 6.

IV. Indorsement: fraudulent, 106. 784. *Post*, VIII. 6. IX. 2.

V. Payment: re-delivery.

The maker of a note, not negotiable, cannot refuse to pay the amount when due, on the ground that the payee has not got it in his possession or power, and cannot produce it for the purpose of delivering it up to the maker on payment. *Wain v. Bailey*, 616.

VI. Notice of dishonour.

1. What sufficient.

D.'s acceptance for 200*l.*, drawn and indorsed by you, due 31st July, has been presented for payment and returned, and now remains unpaid," is a sufficient notice of dishonour. *Cooke v. French*, 131. n.

2. What insufficient.

Messrs. *S.* and Co. inform Mr. *P.* that Mr. *B.*'s acceptance, 87*l.* 5*s.* is not paid. As indorser, Mr. *P.* is called upon to pay the money, which will be expected immediately. *December* 1836.

Held, not sufficient notice to *P.* of dishonour of a bill accepted by *B.*, payable *December* 24. *Strange v. Price*, 125.

VII. Interest.

A promissory note in this form, "I promise for myself and executors to pay *F. H.* or her executors, one year after my death, 300*l.* with legal interest," bears interest from the date of the note. *Roffey v. Greenwell*, 222.

VIII. Pleading.

1. What plea by acceptor not a nullity, 17. 19. *Plea*, I. 1, 2.
2. Plea of verdict and judgment for defendant in former action, 593. *Pleading*, XVIII.
3. Plea of gaming consideration, 59 n. *Post*, IX. 6.
4. Non-production, when a bad plea, 616. *Antè*. V.
5. That indorsee is not a bonâ fide holder.

To assumpsit on a bill of exchange, drawn by defendant, indorsed by him to *H.*, and by *H.* to plaintiff, defendant pleaded that he indorsed in blank, and never delivered the bill to *H.*, but delivered it to *L.*, who, till *H.* became possessed, held it for the sole use of defendant, and for the specific purpose that he, *L.*, should get it discounted for, and pay the proceeds to, defendant; that *L.*, fraudulently and covinously, in violation of good faith, and contrary to the said purpose, delivered the bill to *H.*, and *H.* took it, without discounting for defendant, contrary to the said purpose, and in breach and violation thereof, to wit for the purpose and under colour and pretence of securing an alleged debt from *L.* to *H.*; that *H.* was not a bonâ fide holder for value or consideration, and that plaintiff was not at any time a bonâ fide holder for value or consideration; and that defendant never had received consideration or value from *L.*, or *H.*, or plaintiff, or any other, for the indorsing or payment of the bill. Replication de injuriâ.

Held that, on this issue, the question as to plaintiff was, whether he gave any value for the bill; and that, if he did, he was entitled to the verdict, though the circumstances of the fraud alleged might in other respects be true, and the plaintiff privy to them, for that the denial of his being a bonâ fide holder for value, as here worded, did

not raise the question of his privy to the fraud. *Uther v. Rich*. 784.

6. Fraud how raised, 784. *Antè*, 5.
7. De injuriâ to plea of payment containing surplusage, 593. *Pleading*, XVIII.

IX. Evidence.

1. Competency of drawer of accommodation bill, 606. *Witness*, I. 2.
2. Declarations of former holder.

Assumpsit by indorsee of a note against maker. Plea, that the note was made without consideration, and indorsed and delivered to *W.* for the purpose only of its being discounted; that *W.*, in fraud of defendant, and without his consent, indorsed the same and delivered it to plaintiff, who gave no consideration, and knew of the want of authority. Replication, de injuriâ.

Held, that evidence of declarations made by *W.* was not admissible to prove the fraud, *W.* being alive and not called, and no proof having been previously given of any connexion between *W.* and the plaintiff, or that the plaintiff took the bill under circumstances establishing a privy in point of law between him and *W.* *Phillips v. Cole*, 106.

3. Presumption that note was given for value, 222. *Antè*, VII.
4. Notice to produce, 597 n. *Post*, 6.
5. Identity when admitted, 593. *Pleading*, XVIII.
6. Production when unnecessary.

To a declaration in assumpsit on a cheque, defendant pleaded that it was given for money won at an unlawful game at dice. Issue thereon. The defendant did not give notice to produce the cheque. Held, that, on this issue, the plaintiff was not bound to produce the cheque, either as part of his own case, or, when called upon to do so at the trial, as part of the defendant's evidence. *Read v. Gamble*, 597 n.

See also 593. *Pleading*, XVIII.

7. Verdict, &c. in former action, 593. *Pleading*, XVIII.

BONA FIDES.

I. Entitling a party to notice of action.

Where a statutory protection is given

BONA FIDES, I. II.

given to persons having acted in pursuance of the statute, a party is not entitled to the protection merely because he believed, *bona fide*, that he was so acting. There must be reasonable ground for the belief.

If the party acted under a reasonable, though mistaken, persuasion, from appearances, that the facts were such as made his proceeding justifiable by the statute, he is entitled to protection, though the real facts were such that the statute clearly affords no justification.

Thus, if, by the assumed authority of stat. 7 & 8 G. 4. c. 30. s. 28., which gives power to arrest persons *found committing* certain offences, a party has arrested another as being so found, under circumstances which afforded reason for thinking that he was, at the time, committing such offence, though in reality he was not, and an action is brought for the arrest, the defendant is entitled to notice of action under sect. 41. *Cann v. Clipperton*, 582.

See also 188. *Notice*.

II. Denial by plea, 784. *Bills*, VIII. 5.

BOND.

p. 193. *Surety*. 21. *Plea*, I. 3.

BOOK.

Letterbook, 598. *Letters*.

BOROUGH.

Municipal Corporations.

BOUNDARY.

p. 151. *Evidence*, IX. 1. 711. *Poor*, VI. 1.

BROKER.

I. 1. Implied authority.

A person employing a broker to sell shares, directed him, by mistake, to sell 250 shares, meaning 50. The broker contracted with another broker on the Stock Exchange for the sale. The shareholder, on the next day, informed his broker of the mistake, and asked if the bargain could not be made void;

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the broker answered "No;" and the shareholder then said he must leave the matter in his hands to do the best he could. By the rules of the Stock Exchange, brokers, on sales of this description, do not name any principal, and if the vendor is not prepared to complete his contract, the purchaser buys the requisite number of shares, and the vendor is bound to make up the loss, if any, resulting from a difference in prices. The broker paid such difference, being unable to complete his contract, and the purchaser having made good the shares at a loss. Held, that for the difference so advanced, the shareholder was liable to the broker in *assumpsit* for money paid.

Per Lord Denman C. J. and Little-dale J. A person who employs a broker on the Stock Exchange, impliedly gives him authority to act in accordance with the rules there established, though such principal may himself be ignorant of the rules. *Sutton v. Tatham*, 27.

2. Payments recoverable by, 27. *Ante*, 1.

II. On distress for rent, 640. *Distress*, II.

BROTHEL.

How far a nuisance, 188. *Notice*.

BURGESS ROLL.

Municipal Corporation, III.

CAPIAS AD SATISFACIENDUM.

p. 570. *Arrest*, V. 1. 225. *Scire Facias*, I.

CASE.

I. Against bank for refusing to transfer, &c. 437. *Stock*.

II. Special, 706. *Poor*, VII. 2.

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Arbitration, I. *Mandamus*, V. 2. *Pleading*, IX.

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CERTIFICATE.

- I. See 32. *Arbitration*, IX. 1. 635.
Assault, II. 576. *Contumacy*.
 II. Detainer by agent, 642. *Plea*, II. 2.

CERTIORARI.

- I. When given retrospectively, 281. *Statute*, XXXVI.
 II. To remove orders of town council, 281. *Statute*, XXXVI.

CHAIRMAN.

Casting vote, 706. *Poor*, VII. 2.

CHANCERY.

When proper resort, 272. *Statute*, XXII.

CHARGEABILITY.

p. 679. *Poor*, X. 1.

CHEQUE.

Bills.

CHIEF CONSTABLE.

Constable.

CHILD.

p. 417. *Poor*, IX. 2.

CHURCH-RATE.

Where an act of parliament authorised and required a select vestry, from time to time, as often as occasion required, to make rates for the relief of the poor, and the repair of churches and highways in the parish: Held, that they were not compellable to make a church-rate where the churchwardens refused to state the necessary amount, or to furnish any estimate of it, or to give to the vestry any information whereby they might ascertain it. *Regina v. St. Margaret, Leicester*, 730.

CHURCHWARDENS

See *Church-rate*.

CLERK.

p. 76. *Penalties. Municipal Corporation*.

CODICIL.

Will.

COGNIZANCE.

Replevin, I.

COLLECTOR.

p. 646. *Wreck*.

COLLUSION.

p. 570. *Arrest*, V. 1. 90. *Estoppel*, I. 2.

COLOUR.

Bona Fides. Pleading, VII.

COMMISSION.

p. 27. *Broker*, I. 1.

COMMISSIONERS.

Customs. Poor. Sewers.

COMMON CLERK.

Compensation, 179. *Statute*, XXXIV. 4.

COMPANY.

Partner. Railway.

COMPENSATION.

I. Under Municipal Reform Act.

1. Effect of partial re-election, 179. *Statute*, XXXIV. 4.
2. Effect of temporary re-election, 386. *Statute*, XXXIV. 5.
3. Proper remedy, 374. 386. *Statute*, XXXIV. 5. 5.

4. *Lords*

COMPENSATION, I. 4.—II. 1—4.

4. Lords of Treasury, 179. 374. 386. *Statute*, XXXIV. 3, 4, 5.

II. Under acts for public works.

1. Claim of tenant from year to year.

The *London and Southampton Railway Act* (4 & 5 W. 4. c. lxxxviii.) provides that all tenants from year to year shall deliver up possession to the company at the expiration of six calendar months next after notice, whether such notice be given with reference to the commencement of the tenancy or not, and whether before or after the purchase of the lands by the company, or at such time after the expiration of the notice as they shall be required; and that where any such tenant shall be required to give up possession before the expiration of his term or interest, the company shall make compensation for the value of his unexpired term or interest. On 10th *January* the company gave six months' notice under the act to a tenant from year to year, whose holding began at *Christmas*: after the expiration of the notice, the tenant, who had refused to quit without compensation, was told by the company that possession would not be required till *Christmas*: the company did not take a conveyance of the reversion till 25th *August*.

Held, that the tenant, who voluntarily continued to occupy as usual till *Christmas*, was in the same situation as if a regular landlord's notice had been originally given to him, and was therefore not entitled to compensation. *Regina v. London and Southampton Railway Company*, 3.

2. Effect of notice to quit, 3. *Antè*, 1.
3. Payment of, when not equivalent to a purchase, 503. *Trespas*, 1.
4. Contract for, with peer, 793. *Statute*, III. 1.

COMPETENCY.

Evidence, II. *Witness*, I.

COMPOSITION.

Fraudulent consideration: transaction when not re-opened.

Plaintiff being about to compound with his creditors, defendant, a cre-

CONSIDERATION, I. 1, 2. 833

ditor, refused to subscribe the deed unless he were paid in full; plaintiff, to obtain his signature, gave a bill, payable to defendant's agent, for the difference between 20s. in the pound and 8s., the proportion compounded for. Defendant then signed the deed. Plaintiff did not honour the bill when due; but, on subsequent application, he paid it some months after the dishonour by two instalments to the payee, and defendant received the money. The other creditors were paid according to the deed.

Held, that plaintiff could not recover back the amount paid to defendant above 8s. in the pound; for that the transaction had been closed by a voluntary payment with full knowledge of the facts, and ought not to be re-opened; and that it made no difference that the sum in question had not been recovered by action. *Wilson v. Ray*, 82.

CONCEALMENT.

From legislature, 793. *Statute*, III. 1.

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I. How created, &c.

1. By the word "upon," 335. *Declaration*, III.
2. As distinguished from distinct contract, 499. *Vendors*, III. 2.

II. Precedent.

1. Tender of conveyance, when not, 50. *Vendors*, II. 2.
2. Re-delivery of security, when not, 616. *Bills*, V.
3. Stipulation for periodical accounts, 512. *Vendors*, III. 1.

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- I. What not voluntary, 23. *Arrest*, IV. 4.
- II. Of assignee, to prosecution of action, 625. *Insolvent*.
- III. To admit copies, 598. *Letters*.
- IV. See also *Acquiescence*.

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I. Nature of.

1. Imperfect liability, 460. *Bills*, II.
2. Giving up instrument of doubtful validity, 309. *Guarantee*, I. 3.
3. Usurious,

3. Usurious, 675. *Usury*.
- II. When it need not be expressed, 98. *Bills*, I.
- III. Adequacy, 309. *Guarantee*, I. 3. 784. *Bills*, VIII. 5.
- IV. Parol explanation, 309. *Guarantee*, I. 3.

CONSISTORY COURT.

- p. 576. *Contumacy*.

CONSTABLE.

Chief, how elected.

The election of a chief constable for a wapentake in the West Riding of *Yorkshire* having been made at a petty sessions of the justices usually acting for the wapentake, without notice to the other justices of the riding: Held, that such election was void, and that a chief constable might be elected at a subsequent quarter sessions. *Regina v. Watkinson*, 288.

CONSTRUCTION.

I. General rules.

Most strongly against the maker of an instrument, 222. *Bills*, VII.

II. Of statutes.

1. Grammatical relation, 193. *Surety*.
2. Of statutes in *pari materia*, 157. *Poor*, IV. 1.
3. By analogy, 193. *Surety*.
4. Strict, 685. *Poor*, X. 8.
5. Not forced, 417. *Poor*, IX. 2.
6. Directory, 437. *Stock*.
7. Reasonable, 555. *Declaration*.
8. Perhaps contrary to intention, 157. *Poor*, IV. 1.
9. Retrospective, 281. *Statute*, XXXVI.
10. Only cumulative, 207. *Marshal*.
11. No repeal by implication, 157. *Poor*, IV. 1.
12. Of words tending to repeal a former statute, 640. *Distress*, II.
13. Of statute relaxing a restriction on certain conditions, 555. *Declaration*, III.
14. Of schedule, 640. *Distress*, II.
15. For public works, 531. *Railway*, III.
16. Compensation clauses. *Compensation*.

III. Pleadings.

1. Cumulative charge of various false pretences, 54. *False Pretences*.
2. Of indictments, 132. *Poor*, III.
3. Averment that plaintiff gave up to defendant a guarantee, 309. *Guarantee*, III.
4. Of plea that bank had not received sufficient money for paying the dividends, 437. *Stock*.
5. Of pleas of Not possessed and Lib. ten., 763. *Estoppel*, III.
6. Plea denying bona fides, 784. *Bills*, VIII. 5.

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1. Notice of dishonour. *Bills*, VI.
2. Treasury minute, 179. *Statute*, XXXIV. 4.
3. Sheriff's precept, 477. *Bailiff*, III. 1.
4. Pauper's examination, 685. *Poor*, X. 8.
5. Special case, 706. *Poor*, VII. 2.
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V. Particular words and phrases.

1. The singular number, in a schedule, 640. *Distress*, II.
2. "I agree to pay," what imported by the words, 98. *Bills*, I.
3. "Any false pretence," 34. *False Pretences*.
4. "Committed for trial to the assizes," 740. *Gaol*.
5. "In consideration of your being in advance to L." 309. *Guarantee*, III.
6. "Bona fide," 784. *Bills*, VIII. 6.
7. "With regard to all the circumstances of the case," 179. *Statute*, XXXIV. 4.
8. "Completed," 609. *Amendment*, I.
9. "Default of another person," 453. *Statute*, VI. 3.
10. "In default of such," 385. *Declaration*, III.
11. "Duly," in an indictment, 132. *Poor*, III.
12. "Examination," 679. *Poor*, X. 1.
13. "Which, before the passing of this act, was exempt," 711. *Poor*, VI. 1.
14. "Gave up," 309. *Guarantee*, III.
15. "After

15. "After judgment," 193. *Surety*.
16. "In manner above mentioned," 335. *Declaration*, III.
17. "Any pigstye, necessary, or nuisance," 188. *Notice*, II. 2.
18. "No other method, &c. shall be good or available in law," 437. *Stock*.
19. Notice by "the attorney or agent of the party," 117. *Customs*, III.
20. "Unless he shall have paid," "all such rates," 66. *Statute*, XXXIV. 1.
21. "Placed, elected, or chosen," 361. *Declarations*, III.
22. "According to the practice of the Court," where there is no such practice, 193. *Surety*.
23. "For the purposes of this act," 417. *Poor*, IX. 2.
24. "Such," 635. *Assault*, II.
25. "The time of the completion of the purchase, 50. *Vendor*, II. 2.
26. "Within one calendar month next before or upon his admission," 335. *Declaration*, III.
27. "Wreck," 646. *Wreck*.

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- I. Of trespass, 503. *Trespass*, I.
- II. Of action, 623. *Insolvent*, I.

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- I. Nature and subject.
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 6. Binding on executor, 42. *Executor*, III. 1.
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- II. Construction.
 1. Condition, or distinct contract, 499. *Vendors*, III. 2.

2. Matter in avoidance or of cross-action, 642. *Plea*, II. 2.
3. Time when of the essence, 57. *Statute*, VI. 4.
4. When it supports allegation of statement of accounts, 98. *Bills*, I.
5. When not construed as sale of interest in land, 755. *Vendors*, II. 3.

III. Variation or dispensation, 57. *Statute*, VI. 4.

;CONTRADICTION.

Repugnancy.

CONTUMACY.

The surrogate of the bishop's official principal is not the proper party to signify the contumacy of a defendant in a suit before him as judge of the Consistory Court; and this both before and after stat. 53 G. 3. c. 127.: and, where defendant is taken under a contumace capiendo issued upon such certificate, this Court will discharge him out of custody. *Regina v. Jones*, 576.

CONVEYANCE.

- I. Tender of, 50. *Vendors*, II. 2.
- II. By other than the statutory mode, 437. *Stock*.

CONVICTION.

Where a conviction under sect. 14. of stat. 11 G. 4. & 1 W. 4. c. 64. (for the general sale of beer, &c.) purported to charge the party with the offence of keeping his house open for the sale of beer, and selling beer, and suffering the same to be drank and consumed in the house at an unlawful time, and convicted him in the penalty of 40s. as upon a single offence:

Held, that the conviction was bad, because it included more than one distinct offence; and that trespass lay for levying the penalty by distress. *Newman v. Bendyshe*, 11.

COPIES.

p. 598. *Letters*.

COPYHOLD.

COPYHOLD.

I. Surrender.

By trustee by statute, acceptance, how compelled, 272. *Statute*, XXII.

II. Seizure quousque, 272. *Statute*, XXII.

III. Fine on renewal.

How assessed on admissions of joint-tenants.

1. By a decree in Chancery, to which the lord of the manor was a party, it was ordered that, whenever the trustees of a certain parochial charity, consisting of copyhold of inheritance, should be reduced to five, the lord should, with the approbation of a Master, name nine others, being copyholders and inhabitants of the parish; that a surrender of the lands should then be made, and the fourteen be admitted, paying a reasonable fine. The trust became vacant by the death of ten, and resignation of two, of the trustees so appointed; and fourteen new ones were thereupon duly appointed and admitted. Held (there being no special custom as to fines on such admittance), that a fine, made up of the sum of a geometrical series of nine terms, whose first term was the double value and common ratio $\frac{1}{2}$, with a deduction on account of the right to a renewal fine recurring on the failure of any nine lives out of fourteen, instead of nine absolutely, was reasonable.

Held, also, that the lord was not bound to make a further deduction by reason of his privilege of naming the lives, or of the mature ages of the trustees.

The reasonableness of such a fine, where the value of the land and the amount of deduction, are undisputed, is not a question for the jury. *Wilson v. Hoare*, 236.

2. Where the lord admitted fourteen joint tenants to a copyhold of inheritance, with a power in himself to nominate nine others with the approbation of a Master in Chancery, when the number should be reduced to five, and thereupon to take a reasonable fine on such fresh admission of the old and new tenants:

Held, by the Court of Exchequer

Chamber, that the principle of assessment laid down in *Wilson v. Hoare*, (2 B. & Ad. 350.) was inapplicable, and that a deduction should be made on account of the right to take a new fine on the failure of nine lives out of fourteen, instead of nine absolutely. *Hoare v. Wilson*, 245 n.

IV. Plaint in the nature of a writ of right patent, 248. *Mandamus*, IV. 3.

COSTS.

I. Of various proceedings.

1. Articles of the peace, 47. *Baron and Feme*, III.

2. Rule for a mandamus impugning a decision which was right, 66. *Statute*, XXXIV. 1.

II. In ejectment, 761. *Ejectment*, V. 1

III. On interpleader.

An interpleader rule directed the sheriff to sell the goods claimed, and pay the proceeds into Court to abide the event of an issue between the claimant and the execution creditor, to try the right to them. The jury, on the trial of the issue, found that part of the goods were the sole property of the claimant, and the residue the joint property of the claimant and the party levied upon: Held, that the claimant was entitled to be paid by the execution creditor the general costs of the feigned issue (deducting the costs of the issues found for the latter), and also the costs of appearing to the interpleader rule, and of his subsequent application for the money paid into Court, and for his costs.

And the sheriff was refused his costs of the interpleader rule. *Staley v. Bedwell*, 145.

IV. Taxation.

1. Costs of witness to produce, &c.

The expense of a witness at Nisi Prius to translate and explain ancient records of a public nature, and to watch and explain the records produced by the opposite party, and the expense of searching for, and obtaining copies and translations of, such records to be used in evidence, will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them.

The

The costs of the attendance of an officer of the Court of Chancery, to produce affidavits filed there, for the purpose of using them at a trial to check the testimony of the same deponents at Nisi Prius, will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them. *Bastard v. Smith*, 213.

2. Motion with reference to, when premature. *Doe dem. Oxenden v. Cropper*, 201. n.

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III. Action for seizure.

In trespass for taking a portfolio and drawings, the defendant, an officer of the customs, may justify the seizure by shewing that the portfolio contained drawings liable to seizure for non-payment of duty, which the plaintiff was in the act of carrying ashore out of a foreign packet; though the seizure was in fact made not as on a forfeiture, but for the purpose of examination; and though the articles seized were in fact returned after being examined, and no demand of them had been made before the seizure.

Semble, that if the plaintiff had sued for the assault, the defendant could not have justified without shewing either a previous demand or some circumstance to warrant the use of force in the first instance.

Notice of action (under stat. 3 & 4 W. 4. c. 55. s. 103.) by an infant to an officer of the customs, may be given by his prochein amy, although he may not be the prochein amy on the record. *De Gondouin v. Lewis*, 117.

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Under stat. 9 G. 4. c. 17. ss. 2 and 3., which require that every person who shall be placed, elected, or chosen in or to the office of alderman, &c. shall, *within one calendar month next before or upon his admission* into such office, make and subscribe a certain declaration before certain parties; and sect. 4, which enacts, that, if he shall omit or neglect to make and subscribe the said declaration *in manner above mentioned*, such placing, election, or choice shall be void.

Held, by the Court of Queen's Bench, that the election is not void by refusal to make the declaration, or state whether the party will do so, unless he has first been admitted to the office by swearing in.

Judgment reversed on error, by the Court of Exchequer Chamber.

Held, by that Court, that the statute does not give the party elected a month at all events for deciding whether he will make the declaration or not, but only excuses him from making it at the time of admission, if he has made it within a month before.

That the words "*upon his admission*" mean at the time, and not within a reasonable time after, and that the authorities who admit may prescribe the order in which the ceremonies forming parts of the admission shall take place.

And that, if the party offers himself to the proper court to be admitted, not having made the declaration within a month before, and being asked whether he will make it or not, declines to say, but requires the court to admit him, which they refuse, the election is thereupon void, and a precept may issue for a new election. *Regina v. Humphrey*, 355.

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DELAY.

DELAY.

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- II. Under conditional verdict against wrongdoer, 472. *Estoppel*, I. 4.

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- I. By one of several parties entitled. *Coles v. Bank of England*, 444.
- II. Previous to seizure, 117. *Customs*, III.
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- I. To whole plea, when not bad, 632. *Plea*, II. 1.
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DISTRESS.

- I. Authority by relation.

A cognisance by defendant as bailiff of an executor, for rent due to the testator, is supported by proof of a distress by him in the name of the testator, and by his direction, but after his death; such distress, though made before probate, having been afterwards adopted and ratified by the executor. *Whitehead v. Taylor*, 210.

- II. Number of appraisers.

Stat. 57 G. 3. c. 93. regulating the costs of distress for rent not exceeding 20*l.*, has not repealed the provisions of 2 W. & M. sess. 1. c. 5., so as to make
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an appraisement by one broker sufficient. *Allen v. Flicker*, 640.

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to an arbitrator, together with an action for trespass upon close *B.*, brought by the lessor of the plaintiff against the same defendant. In the action of trespass there were special pleas justifying on the ground of title to close *B.* in defendant.

The arbitrator ordered a verdict on all the issues in trespass for the defendant, except one issue on a plea of not guilty: but he ordered a general verdict for the plaintiff in the ejectment. By a paper which he delivered with the award, stating his reasons, it appeared that he considered that the lessor of the plaintiff had no title to close *B.*

Held that, though there appeared a repugnancy, the *postea* in the ejectment could not be amended by confining it to close *A.*, and that the lessor of the plaintiff was entitled to retain the general verdict. *Doc dem. Osenden v. Cropper*, 197.

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1. Staying proceedings in subsequent ejectment.

Where the lessor of the plaintiff in ejectment is son and heir of the lessor in a former ejectment, and claims under the same title, and against the same defendant, but brings his action for different premises, the Court will stay proceedings until the costs of the first action are paid.

And this, although the lessor in the first action was discharged as an insolvent, while in custody under attachment for non-payment of such costs. *Doc dem. Heighley v. Harland*, 761.

2. Effect of attachment for, 761. *Ante*, 1.

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3. Avoidance by refusing declaration, 335. *Declaration*, III.

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ENCROACHMENT.

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1. What negligence equivalent to, 719. *Sheriff*, IX. 2.
2. Suffered by bailiff of liberty, 477. *Bailiff*, III. 1.
3. Covinous arrest to fix the marshal with an escape.

In debt against the marshal of Q. B. for an escape of *W.*, a prisoner in custody under a ca. sa. at the suit of plaintiff, defendant pleaded that *W.* had the privilege of the rules; that *L.* sued out a capias on mesne process against *W.*; that *L.* and plaintiff, well knowing that *W.* was so privileged, and not legally liable to be arrested out of the rules, "fraudulently, illegally, and covinously combined and conspired" with others to procure *W.* to be arrested on *L.*'s writ; and, in pursuance of such fraudulent &c. caused a sheriff's officer to watch *W.*, to ascertain whether he went beyond the rules, and to arrest him and keep him without the rules if he did; that *W.*, without defendant's consent, went without the rules, and, while he was so, and intended to and was about to return within the rules, plaintiff and *L.*, with others in collusion with them, in further pursuance &c. wrongfully and covinously caused *W.* to be arrested and conveyed to a place without the rules, and there detained during such time as was required to enable plaintiff to sue defendant for the escape; that, had not *W.* been so collusively and illegally detained, he could have returned within the rules before the

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commencement of the suit; that, after the commencement, *W.* returned within the rules, and had been in defendant's custody ever since; and that defendant had no notice of the escape before the commencement of the suit. Replication *de injuria*, as to all but the allegation that *L.* sued out and prosecuted his writ, &c. while *W.* was entitled to the rules.

1. It was proved that *U.* employed a person to watch for *W.* and procure his arrest and detention without the rules, at the suit of *L.*, while *W.* appeared to be intending to return within the rules; and that, during the detention, *U.* went with the attorney's clerk to take out the writ in the action for the escape. The jury, having been satisfied that plaintiff was a party to *U.*'s proceedings, and the judge having directed a verdict for the plaintiff, this Court, on motion, ordered a verdict to be entered for the defendant, on the ground that the jury might infer plaintiff's privity from his adopting *U.*'s acts by bringing the action, and that such privity proved the issue.

2. But the Court granted judgment for the plaintiff, non obstante veredicto, the plea not shewing that *W.* would have returned within the rules had he not been detained without.

3. The rule for entering the verdict for the defendant having been obtained in the first, and made absolute in the sixth term after the trial, the Court, upon making it absolute, granted the rule nisi for judgment non obstante veredicto, considering the case an exception from the rule of *Hil. 2 W. 4. 1. 65. Merry v. Chapman*, 516.

II. Pleading and evidence, 516. *Antè*, I. 3.

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- I. Legal. *Legal Estate*.
- II. Oral determination, 427. *Forfeiture*, I. 1.

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- I. By conduct.
 1. In not quitting according to notice, 3. *Compensation*, II. 1.
 2. In permitting a party to deal with goods as owner.

The owner of goods, who stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them *bonâ fide*, cannot recover them from the vendee.

G., the owner of the fittings of a public-house, demised them to D., who thereupon became tenant of the house to a third party, under an agreement which gave his landlord a lien on the fittings. G. was present at the execution of such agreement. D. afterwards sold the good-will and fittings, without G.'s knowledge or assent, to W., who, being told by the landlord that D. was his tenant, bought them *bonâ fide*, in ignorance of G.'s title, and was accepted by the landlord as tenant in the place of D.

Held, that G. could not maintain trover for the fittings against W., and that the defence was admissible on the plea of *not possessed*. *Gregg v. Wells*, 90.

3. By negligence which facilitated a fraud, 437. *Stock*.

4. By permitting delivery to a party as owner.

Defendant brought trover against D. for a dog, and obtained a verdict for 50*l.* damages, subject to be reduced to 1*s.* on the delivery of the dog to defendant. By plaintiff's authority D. delivered the dog to defendant, at the same time demanding it back on behalf of plaintiff, as his property, at a time named. Afterwards, at the time named, plaintiff demanded the dog, and defendant refused to deliver it.

Plaintiff brought trover; defendant traversed plaintiff's property, and also pleaded not guilty, and leave and licence. Plaintiff new assigned to the plea of leave and licence, to which defendant pleaded not guilty, and leave and licence; to which last plea plaintiff replied *de injuriâ*.

Held, that plaintiff was not precluded from proving his title by having authorised the delivery; and that, on proof of title, he was entitled to a verdict on all the above issues. *Sandys v. Hodgson*, 472.

5. By treating a warrant as a mandate, 477. *Bailiff*, III. 1.

6. By taking advantage of irregularity, 225. *Scire Facias*, I.

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7. By having demanded the proceeding objected to, 248. *Mandamus*, IV. 3.

8. From disputing jurisdiction after applying to it. *Skuse v. Davis*, 635.

9. By public company's assertions in an act obtained by them, 531. *Railway*, III.

II. By first fault in pleading, 632. *Plea*, II. 1.

III. By judgment in ejectment.

Trespass for mesne profits between 10th July 1826 and the commencement of the suit. Pleas, 1. that plaintiff was not possessed of the premises *modo et formâ*; 2. that the premises were the soil and freehold of defendant during all the time, &c. Replication, by way of estoppel, to each plea, that, after 10th July 1826, plaintiff commenced an action of ejectment for recovery of the same premises upon a demise, laid 10th July, 1826, for fourteen years, and a demise laid 26th December 1831 for seven years, and an ouster on 27th December 1831, and had judgment to recover his said terms; concluding with a prayer of judgment if the defendant ought, during the said terms, to be admitted. &c.

Held, on general demurrer, that the replication was good.

And that a rejoinder, stating that no writ of execution was ever issued, nor had plaintiff ever had possession of the premises, but that a writ of error upon the judgment was still pending and undetermined was bad.

The plea of *liberum tenementum* admits a sufficient possession of the plaintiff to support an action against a wrong-doer, but denies his rightful possession, and asserts a right to immediate possession in the defendant. *Doe v. Wright*, 763.

IV. By sheriff's return, 477. *Bailiff*, III.

1. 673. *Sheriff*, II. 2.

V. Between landlord and tenant, 204. *Landlord and Tenant*, I.

VI. Subsequent town council when not estopped from questioning order of previous council, 251. *Statute*, XXXVI.

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2. To let in declarations of former holder of note, 106. *Bills*, IX. 2.
3. That the proper parties are plaintiffs, to the exclusion of another, 113. *Partner*, II.
4. Proper custody of documents, 151. *Post*, IX. 1.
5. Balance of account as a condition precedent, 512. *Vendors*, III. 1.
6. On de injuriā replied to plea of payment containing surplusage, 593. *Pleading*, XVIII.

II. Interest of witness.

1. Apparent on face of plea, 606. *Witness*, I. 2.
2. Incompetency how removed, 606. *Witness*, I. 2.
3. Husbands, liability over.

Trespass for distraining on plaintiff. Plea, that *W.* held the premises as tenant to defendants, at a rent of 10*l.*; and distress for such rent. Replication, non tenuit.

The case opened for the plaintiff at the trial was, that *W.* was seised in fee, and that plaintiff held the premises of him at a rent of 3*l.*

Held, that *W.*'s wife was not a competent witness for plaintiff to prove those facts, because, in the event of a verdict for defendants, *W.* would be liable over to plaintiff; and that the incompetency, being independent of any use that might be made of the verdict, was not removed by 3 & 4 *W. 4. c. 42. s. 26. Wedgewood v. Hartley*, 619.

III. Documentary, generally.

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2. Notice to produce. *Notice*, III.
5. Effects of undertaking to produce copies, 598. *Letters*.
4. Order to admit, 598. *Letters*.
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7. Proof of proper custody, 151. *Post*, IX. 1.
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11. Parol to explain written document. To explain ambiguous consideration for guarantee, 309. *Guarantee*, I. 3.
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3. Presentment in manor court, 151. *Post*, IX. 1.
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5. Orders of Commissioners of Sewers, 398. *Sewers*.
6. Depositions of petitioning creditor's agent on opening a fiat, 464. *Bankrupt*, V.
7. Of special contract given in evidence for defendant, 512. *Vendors*, III. 1.
8. Copies of letters in letterbook, 598. *Letters*.

VI. Parol, notwithstanding the existence of a writing.

1. Minutes of terms.

A witness, produced to prove a parol demise from plaintiff to defendant, stated that, at the time of making it, plaintiff looked at written minutes, from which he appeared to read the terms to which defendant assented. Held that, in the absence of any further proof respecting the nature of the minutes, parol evidence of the terms of the demise was admissible. *Trewhitt v. Lambert*, 470.

2. See also, 309. *Guarantee*, I. 3.
2. Release to remove incompetency, 606. *Witness*, I. 2.

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1. Award.

On an issue respecting the boundary of a parish and county, an award in
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a suit inter alios, in which the arbitrator set out the boundary as proved before him, and a verdict was entered according to his direction, is not admissible as evidence of such boundary.

Although verdicts are, upon authority, admitted as proof of reputation, the rule does not extend to awards.

A presentment in a manor court, setting forth the bounds of a manor, is admissible evidence of such bounds, though part of the document, unconnected with the subject of bounds, has been cut out.

Where an ancient manor book is offered in evidence, the custody must be proved by a sworn witness. It is not enough that the book is produced in court by the counsel or steward of the lord of the manor, nor, as it seems, by the lord of the manor in person. *Evans v. Rees*, 151.

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X. Declarations.

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4. In ignorance of law, 460. *Bills*, II.
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6. Assertions in acts obtained by public companies, 531. *Railway*, III.
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2. What not admitted by plea of not guilty, 76. *Penalties*.
3. By de injuria, 593. *Pleading*, XVIII.
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2. Under plea of not possessed, 90. *Estoppel*, I. 2.

3. Under plea of non tenuit, 204. *Landlord and Tenant*, I.
4. Under plea denying property, 437. *Stock*.
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8. Covin of plaintiff to fix marshal with an escape, 516. *Escape*, I. 3.
9. Of ceasing to be director of a company, 113. *Partner*, II.
10. Duress, 23. *Arrest*, IV. 4.
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EXAMINATION.

EXAMINATION.

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II. Acts by.

1. Ratification, 210. *Distress*, I.

2. Demand by one of several. *Coles v. Bank of England*, 444.

III. How far bound by act of deceased.

1. Contract.

Plaintiffs entered into an agreement with *C.* to supply him with a certain quantity of slate immediately; with a certain other quantity monthly, at a fixed price; and with any further quantity, monthly, that *C.* might require. *C.* engaged to receive the slate, not exceeding 200 tons per month; and the agreement was to be in force till 1st January 1838.

Held, that plaintiffs might sue the administrator of *C.* for refusing to receive slate sent, in pursuance of the contract, after *C.*'s death, and before the 1st January 1838. *Wentworth v. Cock*, 42.

2. Gross negligence, 437. *Stock*.

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By sheriff's officer, 494. *Bailiff*, II. 3.

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FALSE PRETENCES.

Indictment stated that defendant falsely pretended to *W.* that he, defendant, was a captain in the *East India Company's* service, and "that a certain promissory note which he," the defendant, "then and there produced and delivered to" *W.*, "purporting to be made for the payment of the sum of 21*l.*" (not saying by whom it purported to be made, nor otherwise describing it), was a good and valuable security for 21*l.*: by which false pretences he obtained, &c. Whereas defendant was not a captain in the company's service, and whereas the said promissory note which he then and there produced and delivered to *W.* "was not a good and valuable security for the sum of 21*l.*, or for any other sum." Verdict, Guilty.

Held, on writ of error, that the indictment did not sufficiently describe the note, or shew how it was wanting in value; and that a conviction could not be supported on the representation as to the defendant's character, because the false pretences were so connected on the record, that one could not be separated from the other.

Judgment for the crown reversed *Regina v. Wickham*, 34.

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1. By disclaimer.

A tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own. *Doe dem. Graves v. Wells*, 427.

2. Equitable relief.

FUNDS, PUBLIC.

In an action of ejectment on a forfeiture by breach of covenant to repair, the Court has no power to stay proceedings upon terms, if the lessor of the plaintiff does not consent. *Doe dem. Mayhew v. Asby*, 71.

II. For duty, 117. *Customs*, III.

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1. Illusive delivery when not, 472 *Estoppel*, I. 4.
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1. Of agent, 516. *Escape*, I. 3.
2. Fraudulent transfer, 437. *Stock*.
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GAOL.

GAOL.

Costs chargeable to town council.

Under stat. 5 & 6 W.4. c. 76. s. 114., the county treasurer may order the council of any borough within the county, having separate quarter sessions, to pay to the county the expences of prisoners committed from such borough for trial at the assizes, and confined in the county gaol, though such prisoners were committed before trial to the borough gaol, not the county gaol, and were not confined in the county gaol till after the bills against them were found.

And such order may be made without any contract between the borough and county justices.

The expences are to be estimated by dividing the whole expences of the gaol according to the number of prisoners and the periods of their confinement, and are not limited to the expences incurred in respect of the individual prisoners. *Regina v. Johnson*, 740.

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- I. By statute, 632. *Plea*, II. 1.
- II. *Plea* amounting to, 642. *Plea*, II. 2.
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- I. Of dismissal of complaint, 635. *Assault*, II.
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I. Requisites.

- 1. Writing, 453. *Statute*, VI. 3.
- 2. Stamp, 309. *Post*, I. 3.
- 3. Consideration.

Declaration in assumpsit, that defendant promised, in consideration that plaintiffs, at his request, would give up to him a certain guarantee of 10,000*l.* on behalf of L., then held by plaintiffs. Averment, that plaintiffs gave up the guarantee, but defendant did not perform his promise. Plea, that the guarantee was a promise to answer for the debt of another, and that there was no agreement, &c. in writing, wherein any sufficient consideration was stated (according to stat. 29 Car. 2. c. 3. s. 4.). And that the supposed guarantee was contained in the following written memorandum, signed by defendant:—"Messrs. H." (the plaintiffs). "In consideration of your being in advance to L. in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount on this behalf. J. B."

Held, by the Court of Queen's Bench, on demurrer, that the words of the guarantee did not necessarily imply a past advance; and that, if they left it even doubtful whether a future advance was not guaranteed, a promise made in consideration of giving it up was valid. But,

Held further, that at all events it appeared on the pleadings that the plaintiffs had delivered something to the defendant, on the faith of his promise, which he at the time considered valuable, and this being so, and no fraud imputed, he could not afterwards excuse a breach of the promise, by alleging that the thing given up was not of the value he had supposed.

Judgment affirmed on error, by the Court of Exchequer Chamber.

Held, by the Court of Error, that the guarantee did not necessarily imply a past advance; and that the plaintiffs, on a trial, might have offered evidence to shew that future advances had been contemplated.

Held also, *Maule B. dubitante*, that the paper on which the guarantee was written appeared by the declaration and

and plea to have been given up by plaintiffs to defendant; and that this alone was consideration for a promise.

Held, by the Court of Queen's Bench, that, on the trial of an issue of fact raising the question, whether or not the above guarantee had been delivered up, the guarantee might be given in evidence, though unstamped. *Haigh v. Brooks*, 309.

II. Continuation.

The following guarantee was given to the firm of *M. and D.*, the actual members of which at the time were *M., D.*, and *N.*:—" *G. C.* is desirous of commencing business in your line, and wants the usual credit for six months: if you think well to supply him, I will be answerable for the amount of 100*l.*"

Held, that on *N.* withdrawing from the firm (which continued under the names of *M. and D.*), the guarantee ceased; no intention appearing on the instrument that the responsibility should continue after such change in the partnership. *Dry v. Davy*, 30.

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IV. Evidence: parol explanation, 309. *Ante*, I. 3.

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II. Proceedings when stayed for costs of ancestor, 761. *Ejectment*, V. 1.

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I. Turnpike road: action against trustees, 503. *Trespass*, I.

II. General issue by statute, 632. *Plea*, II. 1.

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IDENTITY.

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I. Of law, 460. *Bills*, II.

II. Of fact, 437. *Stock. Bona Fides. Scienter*.

III. Of justice, that witness was incompetent, 699. *Poor*, XII. 1.

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When not cured, 570. *Arrest*, V. 1.

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INDORSEMENT.

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Criminal Information. Quo Warranto.

INSOLVENT.

- I. Effect of assignment on action previously commenced.

To assumpsit for goods sold, &c. it is a good plea in bar of further maintenance, &c. that, after action commenced, plaintiff took the benefit of the Insolvent Debtors' Act, 7 G. 4. c. 57., and assigned to the provisional assignee, whereby plaintiff's right of action vested in such assignee.

Replication to such plea, that, after assignment, the provisional assignee had notice of such suit, and permitted it to continue, until he afterwards (and after the above plea pleaded) assigned to other assignees appointed by the Insolvent Debtors' Court; that such assignees afterwards had notice of the suit, and assented to its being continued for the benefit of the creditors;

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and that it is so continued with their consent and on their behalf by such assignees: Held bad on general demurrer. *Swann v. Sutton*, 623.

II. Effect of discharge.

1. On attachment for costs, 761. *Ejectment*, V. 1.
2. On privies in interest, 761. *Ejectment*, V. 1.

III. Pleading, 623. *Ante*, I.

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- I. Of testator, 228. *Will*, II.
- II. To return after escape, 516. *Escape*, I. 3.
- III. When it must be alleged, 793. *Statute*, III. 1.

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- I. Usurious, 675. *Usury*.
- II. From what date, 222. *Bills*, VII.
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- I. When it does not dispense with notice of action, 188. *Notice*, II. 2.
- II. Discharge from arrest for, how far it is an estoppel, 225. *Scire Facias*, I.
- III. Cured during same sessions, 706. *Poor*, VII. 2.

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- I. Fine, 258. 245 n. *Copyhold*, III. 1, 2.
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- I. Power to amend, 609. *Amendment*, I.
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- I. For want of a plea, 21. *Plea*, I. 5.
- II. 1. Non obstante, 121. *Payment*, IV.
2. 590. *Nuisance*, II. 616. *Bills*, V.
2. Time of moving for, 516. *Escape*, I. 3.
- III. *Sci. fa. Scire Facias*.
- IV. Effect.
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- V. Pendency of writ of error, 763. *Estoppel*, III.

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- I. Over frivolous pleading, 17. 19. 21. *Plea*, I.
- II. To give equitable relief, 71. *Forfeiture*, I. 2. 412. *Annuity*.
- III. Of lords of treasury in compensation cases, 179. 374. 386. *Statute*, XXXIV. 3, 4, 5.
- IV. When it must be shewn, 635. *Assault*, II. 699. *Poor*, XII. 1.
- V. See also *Justices. Sessions*.

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- I. Question for, 236. *Copyhold*, III. 1.
- II. Verdict how altered, 32. *Arbitration*, IX. 1.

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- I. Election of constable by, 288. *Constable*.
- II. Presumption, 635. *Assault*, II.
- III. Jurisdiction in boroughs, 711. *Poor*, VI. 1.

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- IV. Shewing jurisdiction, 635. *Assault*, II. 699. *Poor*, XII. 1.
- V. Certificate of dismissal, 635. *Assault*, II.
- VI. Admission of illegal evidence by, 699. *Poor*, XII. 1.

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- In real owner, 437. *Stock*.

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- Fructus industriales and prima vestura, 753. *Vendors*, II. 3.

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- I. Tenancy, how created.

N., having no title to certain premises, let them by parol, and received rent. Afterwards another claimant, *B.*, demanded the rent; and *N.*, being satisfied with *B.*'s title, informed his tenant, in *B.*'s presence, that he had given up the premises to *B.*, who was now the landlord, and that the rent was thenceforth to be paid to *B.* The tenant acquiesced; and, when *B.* demanded the next quarter's rent, paid part of it on account: Held, that the tenant could not afterwards set up the title of a third claimant who had demanded rent, but had taken no step to eject him, no deception by any of the parties having been suggested. *Hall v. Buller*, 204.

- II. Attornment: by mistake, 204. *Ante*, I.

- III. Tenant.

- 1. Compensation to, 3. *Compensation*, II. 1.
- 2. Estoppel, 204. *Ante*, 1.

- IV. Forfeiture.

- 1. For breach of covenant to repair, 71. *Forfeiture*, I. 2.
- 2. Not of definite term by oral disclaimer, 427. *Forfeiture*, I. 1.

- V. Distress. *Distress*.

- VI. Notice to quit.

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2. Incompetency of landlord as witness for tenant. 619. *Evidence*, II. 3.

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Conveyance by trustee, 272. *Statute*, XXII.

LETTERS.

Plaintiff gave defendant notice to produce certain specified letters written by defendant to his partner, and a letter-book kept by him, containing copies of the above letters; and defendant consented to admit copies of the letters, saving just exceptions, &c., and undertook to produce the letter-book in proof of them.

Held, first, that the book when produced by defendant was good secondary evidence against him of the letters specified in the notice: secondly, that, supposing proof of the sending of the letters to be material, the fact of their being transcribed in such a book was evidence of it as against defendant; thirdly, that defendant had no right to read, in his own behalf, other letters upon the same subject, copied in the same book, but not referred to in those read by the plaintiff.

Held also, that, although the above letters were written to a partner resident in *New South Wales*, yet, as there had been proceedings in Chancery between the same parties on the subject of the action six years before the trial, in the course of which the letters had been referred to, the Court would presume that they had been remitted to

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England, and that three days' notice to produce them was therefore sufficient.

Held also, that, the object of the evidence being to prove admissions by defendant, the transcripts in the book, made by defendant or by his authority, were alone sufficient for that purpose, without proving, or giving notice to produce, the originals. *Sturge v. Buchanan*, 598.

LEVY.

p. 675. *Sheriff*.

LIBEL.

- I. In an official notice, 188. *Notice*, II. 2.
- II. Notice of action in, 188. *Notice*, II. 2.

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p. 477. *Bailiff*, III. 1.

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- I. Notice of action under, 188. *Notice*, II. 2.
- II. See *Statute*, XLI. — XLIII.

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Of manor. *Copyhold*.

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- I. Separate, 47. *Baron and Feme*, III.
- II. Of wife's children, 417. *Poor*, IX. 2.
- III. Of bastard, 423. *Poor*, XVI.

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- 1. To compel the completion of a public work, 531. *Railway*, III.
- 2. Notwithstanding another remedy, 531. *Railway*, III.

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- 1. To hear and determine, when the tribunal has in fact heard and determined 179. 374. *Statute*, XXXIV. 4, 5.
- 2. To proceed on a plaint when the Court has proceeded to judgment though erroneous, 248. *Post*, IV. 5.
- 3. Where the Court of Chancery is better able to deal with the question, 272. *Statute*, XXII.

III. In particular cases.

- 1. In compensation cases. *Compensation*.
- 2. To insert names on burgess roll, 66. *Statute*, XXXIV. 1.
- 3. To lord of manor to proceed on plaint, 248. *Post*, IV. 3.
- 4. To lord of manor to accept surrender, 272. *Statute*, XXII.
- 5. To hear appeal, 685. *Poor*, X. 8.
- 6. To levy church-rate, 730. *Church-rate*.
- 7. To parish officers to pay to treasurer of union, 736. *Poor*, II. 1.

IV. Return.

- 1. Impossibility, 531. *Railway*, III.
- 2. Particularity in, 736. *Poor*, II. 1.
- 3. Of variety of causes, when not bad,

Mandamus to the lord and steward of the manor of *O*. recited that, at a manor court holden before the steward in *May*, a plaint in the nature of a

MANDAMUS, IV. 3, 4. V.

writ of right, according to the custom, &c. was presented to the steward, received by him, and enrolled in the Court rolls: that at a court holden in *August*, the demandant and tenant appeared, but that the steward refused to proceed upon the plaint; and the mandamus commanded the lord and the steward to proceed on the said plaint.

Return, that at the court of *August* the tenant objected to the making the plaint, as erroneous and irregular on two grounds; whereupon it was considered and ordered by the Court that, for those errors, the plaint and proceedings should be set aside, reversed, annulled, and altogether held for nothing; and that the Court would take no farther cognisance thereof; and thereupon the plaint and proceedings were set aside &c.: that, notwithstanding, a court was holden, in obedience to the mandamus, in the *October* following the issuing of the mandamus, whereat the tenant contended that, for the former objections and another, the plaint presented in *May* was erroneous and irregular; and upon those grounds, and because of the judgment of the Court in *August*, he prayed that the plaint might be held for nothing, and that the Court would take no further cognisance thereof; whereupon it appeared to the Court that there was error in the plaint and proceedings, and that the court ought not to take cognisance or proceed thereon; and it was considered and adjudged that the plaint and proceedings were rightly set aside at the Court of *August*, and that the Court ought not to take further cognisance thereof.

Upon objection that the return was contradictory and repugnant, as shewing that the Court proceeded in *October* upon a plaint already annulled, and that there was no judgment set forth:

Held, that the return was good, inasmuch as there was no contradiction, and that the Court appeared to have adjudged; and this Court, upon the present proceeding, could not inquire whether or not the adjudication was erroneous or informal. *Regina v. Old Hall*, 248.

- 4. When quashed on motion, 736. *Poor*, II. 1.

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- 1. On

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 2. Certainty required in writ, 551. *Railway*, III.
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 4. On concilium. *Regina v. St. Margaret, Leicester*, 732 n.
- VI. Costs, 66. *Statute*, XXXIV. 1.

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To bailiff, 477. *Bailiff*, III. 1.

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- I. Presentment, 151. *Evidence*, IX. 1.
- II. Proceedings on plaint in court baron, 248. *Mandamus*, IV. 5.
- III. See also *Copyhold*.

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MARSHAL.

The summary remedy given by stats. 2 G. 2. c. 22. s. 6. and 32 G. 2. c. 28. s. 11. to a prisoner for an abuse committed by a gaoler, &c. in his office, is cumulative; therefore the Court will not stay proceedings in an action of trespass commenced by a prisoner for such abuse.

But *semble*, if the prisoner resorts to his summary remedy, and obtains the decision of the Court thereon, he will not be permitted afterwards to bring an action for the same cause. *Yorke v. Chapman*, 207.

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- I. Servant, who is not, 646. *Wreck*.
- II. Settlement, 693. *Poor*, XII. 4.

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- II. Effect of writ of error on the judgment in *Ejectment*, 763. *Estoppel*, III.
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- I. Of sheriff's officer, 25. *Arrest*, IV. 4.
- II. Of real owner, 90. *Estoppel*, I. 2.

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- I. Of testator as to facts, 238. *Will*.
- II. Effect of acquiescence and payment of rent by, 204. *Landlord and Tenant*, I.
- III. When not remediable by mandamus, 179. *Statute*, XXXIV. 4.
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- II. Qualifications of burgesses.
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- IV. Elections in council.
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V. Aldermen.

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2. Criminal information, how not to be defended, 281. *Statute*, XXXVI.
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VI. Councillor.

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1. Not perpetually identical, 281. *Statute*, XXXVI.
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X. Clerk of the peace.

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XI. Town clerk.

1. Appointment of deputy, 76. *Penalties*.
2. Grounds of dismissal, 374. *Statute*, XXXIV. 5.
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XII. Compensation. *Statute*, XXXIV. 3, 4, 5. *Compensation*, I.

XIII. Borough fund.

To what purposes not applicable, 281. *Statute*, XXXVI.

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XV. Certiorari.

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- I. Estoppel by, 437. *Stock*.
- II. Of sheriff, 719. *Sheriff*, IX. 2.
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- I. 1. Acting with, 82. *Composition*.
2. Of rules of office when presumed, 162. *Witness*, II.

II. Of action.

1. By prochein amy, 117. *Customs*, III.
2. When it must be absolute.

Where a clause in a statute (50 G. 3. c. cxlix. s. 105., local and personal, public) required thirty days' notice of action for any thing done in pursuance of it, and enabled the party complained of to tender amends for any irregularity: Held, that a letter written to the defendant, who justified under the act, requesting him to communicate the names of certain parties, and stating that, unless the request was complied with, the plaintiff would "take

"take proceedings against him accordingly," was not a sufficient notice within the statute.

The act authorised trustees, upon complaint of any inhabitant, and "due investigation," to order "any pigstye, necessary, or nuisance," in or near the streets, &c. to be removed within seven days after notice in writing to the occupier of the premises wherein such nuisance was situate. The trustees issued such a notice to the plaintiff, imputing that he kept a brothel, and ordering him to discontinue such nuisance. Plaintiff thereupon brought an action, as for a libel, against the clerk who signed the notice: Held, that he was entitled to notice of action under the above clause, although it did not appear that there had been either complaint or investigation before the issuing of the order.

Semble, a brothel is a nuisance within the meaning of such an enactment, per Lord Denman C. J. at *Nisi Prius*. *Norris v. Smith*, 188.

3. When not dispensed with by irregularity in *bonâ fide* proceedings, 188. *Ante*, 2.
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2. Of filiation, 423. *Poor*, XVI.
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I. A brothel, 188. *Notice*, II. 2.

II. Plea claiming easement.

Case for annoying plaintiff in the enjoyment of his house, by causing
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offensive smells to arise near to, in, and about it. Plea, enjoyment as of right for twenty years of a mixen on defendant's land contiguous and near to plaintiff's house, whereby, during all that time, offensive smells necessarily and unavoidably arose from the said mixen. On a traverse of the right, the defendant had a verdict. Held, that the plea was bad, and plaintiff entitled to judgment non obstante, for that it did not shew a right to cause offensive smells in the plaintiff's premises, nor that any smells had in fact been used to pass beyond the limits of defendant's own land. *Flight v. Thomas*, 590.

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- I. On face of order, 417. *Poor*, IX. 2.
- II. Time of taking, 531. *Railway*, III.
- III. Omission to object, 437. *Stock*.
- IV. To evidence before justices, when too late, 699. *Poor*, XII. 1.
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I. Change in firm.

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II. Management by directors.

Authority how proved.

The directors of a private company, formed under a deed of settlement, sued upon a contract made with themselves as directors. On the trial it appeared that there was another director,

tor, not named as plaintiff, who had become bankrupt, and had ceased and declined to act, or attend the board of directors, when the contract was made.

Held (on non-assumpsit), that the plaintiffs ought to have produced the deed to shew that they had authority, in the character of directors, to sue for the company; and also to shew that the office of director was determined by bankruptcy, or by voluntarily ceasing to act. *Phelps v. Lyle*, 113.

III. Authority to sue, 113. *Ante*, II.

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II. Effect.

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2. When bad after verdict.

In indebitatus assumpsit for various debts, amounting in the whole to 500*l.*, the declaration admitted payment of 158*l.* on account, and alleged that the residue remained unpaid, to plaintiff's damage of 200*l.* Plea, as to the said residue, that defendant paid, and plaintiff accepted, 6*l.* 10*s.* in full satisfaction thereof, and of all causes of action in respect thereof. The replication denied the payment in satisfaction, and, upon issue joined, the jury found for defendant.

Held, that the plea, alleging the acceptance of a less in satisfaction of a larger sum, was bad after verdict; and that plaintiff was entitled to judgment non obstante veredicto. *Down v. Hat-cher*, 121.

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Debt for penalties under stat. 22 G. 2. c. 46. s. 14., for acting as attorney at the sessions of the peace where defendant "executed the office" of deputy clerk of the peace. Plea, not guilty. Held, that plaintiff was bound, upon this issue, to prove the actual exercise of the office by defendant; and that a finding by the jury that defendant "had never acted" as such deputy, negatived the charge in the declaration.

The town clerk, to whose office that of clerk of the peace had usually been incident, appointed defendant his deputy in the office of town clerk. Held, that, for the purpose of this action, defendant was not deputy clerk of the peace; and *semble*, that even if the appointment made him such deputy, he was not liable to the penalties if he abstained from acting, and the duties of clerk of the peace were always performed by the principal in person. *Faulkner v. Chevell*, 76.

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I. In grounds of appeal, 682. *Poor*, XII. 3.

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PLEA.

I. Frivolous.

1. When not set aside.

In an action by indorsee against acceptor, defendant pleaded that he had no notice of the indorsement; that he did not promise to pay; and that plaintiff had not paid the whole consideration. The Court refused to set aside the plea as a nullity upon motion.

Where a plea is clearly frivolous, the Court will set it aside, although the defendant is not under terms to plead issuably. *Horne v. Keppel*, 17.

2. When set aside.

Action on two bills of exchange by indorsee against acceptor. Plea, as to one bill, no consideration between drawer and defendant; as to the other, no consideration paid by plaintiff to defendant. The Court set aside the pleas with costs, and allowed plaintiff to sign judgment, though defendant was not under terms. *Knowles v. Burward*, 19.

3. When treated as a nullity.

Debt on bond against *A.* and *B.* Defendant *A.*, being under terms to plead issuably, pleaded that plaintiff ought not further to maintain his action, because defendants were in partnership as attornies, and, after the commencement of the suit, in consideration that defendant *A.*, at the request of plaintiff and of defendant *B.*, would dissolve partnership, plaintiff agreed to forbear all further proceedings in the action; and the partnership was dissolved accordingly. Plaintiff signed judgment as for want of a plea. On motion to set aside the judgment, the Court discharged the rule with costs. *Blackburn v. Edwards*, 21.

II. Defects.

1. Bad in part when bad altogether.

Debt for goods sold and delivered, money had and received, and on an account stated. Plea, nil debet (pleaded before *Reg. Gen. Trin. 1 Vict.* requiring the words "by statute"). Special demurrer. Held that, since the new rules of pleading, the plea could, under no circumstances, be good as to the last count; and that, being pleaded to

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the whole declaration, it was bad for the whole. *Calvert v. Moggs*, 632.

2. Amounting to general issue.

Assumpsit for money paid. Plea, that the money was paid by plaintiff as agent for defendant, in the purchase of railway shares; that plaintiff thereupon received certificates of the title of said shares, and ought to have delivered them to defendant, but refused to do so, and afterwards wrongfully converted them to his own use, whereby the shares and certificates became lost to defendant: Held, that the plea was bad, inasmuch as it either amounted to the general issue, or alleged matter that was no avoidance of the contract, but only a ground of cross-action. *Francis v. Baker*, 642.

III. Particular pleas.

1. General issue by statute, 632. *Ante*, II. 1.2. Denying bona fides, 784. *Bills*, VIII. 5.3. Nil debet, since new rules, 632. *Ante*, II. 1.4. Dismissal by justices, 635. *Assault*, II.5. Election on vacancy by refusal to make declaration, 535. *Declaration*, III.6. Statute of Frauds, 309. *Guarantee*, I. 3.7. Lib. ten., 763. *Estoppel*, III.8. Not possessed, 90. 763. *Estoppel*, I. 2. III.9. Previous satisfaction, 121. *Payment*, IV. 2. 225. *Scire Facias*, I. 503. *Trespass*, I.10. Right to cause smells in alieno solo, 590. *Nuisance*, II.11. See also *Estoppel. Fraud. Insolvent*.

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 1. When it may be rejected, 593. *Post*, XVIII.
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- VIII. Particularity.
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- IX. Certainty.
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- X. Implication, 719. *Sheriff*, IX. 2. 763. *Estoppel*, III.
- XI. Admission by pleading over.
 1. By replying circumstances qualifying a refusal, 535. *Declaration*, III.
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- XII. Authority: jurisdiction, 635. *Assault*, II.
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- XV. Time.
 1. In plea in excuse, 516. *Escape*, I. 3.
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1. In plea of user, 590. *Nuisance*, II.
2. Presumption from venue. *Skuse v. Davis*, 635.

XVII. Allegation of damage, 719. *Sheriff*, IX. 2.

XVIII. Surplusage.

When it may be rejected.

Assumpsit on a promissory note by indorsee against maker. *Plea*, that it was delivered by defendant to the indorser *J.*, to enable him to take up a former note, also made payable by defendant to *J.*, for the accommodation of *J.*, and by him indorsed to plaintiff; and that, after the note declared on became due, the amount was paid to plaintiff by defendant. Replication, de injuriâ generally.

Held, that the averment, introductory to the payment of the last mentioned note, might be rejected as surplusage; that the payment only need be proved; and that such payment might be shewn without producing the note itself.

Held also, that, in an action by plaintiff on the first note, a verdict and judgment for defendant on the above issue would not be pleadable in bar, nor evidence of any immaterial statements in the plea; for that the replication only put in issue material allegations. *Shearm v. Burnard*, 593.

XIX. In particular cases. See *Escape*. *Mesne Profits*. *Parliament*. *Sheriff*. *Stock*.

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I. Poor Law Commissioners. Indictment for not accounting pursuant to their rules, 152. *Post*, III.

II. Government by board of guardians.

1. Appointment how disputed on return to mandamus.

Mandamus to the officers of a parish included in an union (formed under 4 & 5 W. 4. c. 76. s. 26.) reciting the due appointment of certain persons to be guardians of the poor of the union, and directing them to pay a sum, out of the poor-rates collected by them, to the treasurer of the union. Return, that the said supposed guardians were not, nor were any of them, duly appointed under the provisions of the act, &c.; and that, at the issuing of said writ, the said supposed guardians therein mentioned were not, nor were any of them, guardians of the poor of the said union.

Held, that the return was insufficient for not distinctly setting forth any defect in the appointment; and the return was quashed on motion, and a peremptory mandamus awarded. *Regina v. St. Andrew and St. George*, 736.

2. Signature of notice of filiation, 423. *Post*, XVI.

3. Auditor, 132. *Post*, III.

III. Overseers' accounts.

An indictment against overseers on sect. 47. of stat. 4 & 5 W. 4. c. 76., for not accounting to the auditor of a union, upon request, on a day appointed by him, is bad unless it appear that there was some rule, order, or regulation of the commissioners that the overseers should account upon such request.

Where no such order, &c. is alleged, the indictment cannot be sustained after verdict, merely because it appears, by inference, or the inducement, that defendants have not in fact accounted for one whole quarter.

Upon such indictment it is sufficient, at least after verdict, to allege the order to have been made by "the Poor Law Commissioners for England and Wales," without naming each commissioner; and to state that a copy of the order under seal, &c. was "duly sent" to the overseers, without alleging actual service of it on them. Per Lord Denman C. J. and Patteson J.

Quære, whether disobedience of an order of the commissioners to account

be indictable under sect. 98., before the third offence? *Regina v. Crossley*, 132.

IV. Property rateable.

1. Stock in trade.

The parochial assessment act, 6 & 7 W. 4. c. 96., does not alter the law as to the rateability of personal property; therefore a poor-rate made after the statute, omitting stock in trade which yields a profit in the parish, is liable to be quashed on appeal. *Regina v. Lumsdaine*, 157.

See also, 711. *Post*, VI. 1., and the temporary act, 5 & 4 Vict. c. 89.

2. Union workhouse.

The guardians of an union formed under stat. 4 & 5 W. 4. c. 76. s. 25., comprehending the parish of *M.* and others, built a workhouse in *M.* for the employment of the poor, under 4 & 5 W. 4. c. 76. s. 23.

Held, that the guardians were rateable in the parish of *M.*, as occupiers of the workhouse. *Regina v. Wallingford Union*, 259.

V. Payment of rates.

1. By third party without authority, 66. *Statute*, XXXIV. 1.
2. Settlement by, how described, 682. *Post*, XII. 3.

VI. Appeal against rate.

1. Jurisdiction.

Before the passing of stat. 5 & 6 W. 4. c. 76. (Municipal Corporation Act), the borough of *B.* had a quarter session and four justices, but no non-intromittant clause. The parish of *B.* was wholly within the jurisdiction of the borough justices, though part only was within the borough; and both parish and borough were within the county of *S.* By the operation of that act, part only of the parish was included within the new boundary of the borough, and neither the recorder nor the borough justices had any jurisdiction over the rest of the parish. Since that act there were separate quarter sessions and seven justices for the borough. The overseers of the parish made one poor-rate for the whole, which was duly allowed by justices, both of the county and borough. An inhabitant and occupier of land in the

the part out of the borough appealed against the rate, on the ground that certain inhabitants of the part within the borough were not rated in respect of stock in trade.

Held, that the county sessions had jurisdiction to try the appeal, and to amend the rate by inserting the stock in trade; for that the county justices had jurisdiction by virtue of 1 G. 4. c. 56., before the passing of stat. 5 & 6 W. 4. c. 76.; and sect. 111. of the latter act excludes their jurisdiction only where the borough was before exempt from it. *Regina v. Bridgewater*, 711.

2. See also *Post*, XIII.—XIV.

VII. Settlement by renting a tenement.

1. How described, 682. 688. *Post*, X. 8. XII. 3.
2. Value.

A case from the quarter sessions stated that, the justices being equally divided in opinion, the chairman gave a casting vote in favour of the order, which was confirmed accordingly; that on the following day the appellants' counsel protested against the legality of the decision; that "the question" was then argued on both sides; and that the justices then present "determined to adhere to" the former decision: Held, that, although the proceeding on the first day was irregular, this Court would not assume that the decision on the second day was not a judgment upon the merits.

Pauper rented a cottage and premises, including a ferry with the use of a boat and line, across an adjoining river. The premises, without the ferry, were not worth 10*l.* a year. Held, that the ferry might be included in order to make up the necessary value; and that, supposing the boat and line to be distinct personal chattels, the Court would not presume that the value of the tenement would be insufficient without them, upon a case reserved which did not shew such insufficiency. *Regina v. Fladbury*, 706.

3. Joint occupation.

A settlement cannot be gained under 6 G. 4. c. 57. by renting and occupying a tenement jointly with another person. *Regina v. Caverswall*, 270.

4. Variance, 685. *Post*, X. 8.

VIII. Settlement by hiring and service.

How described, 693. *Post*, XII. 4.

IX. Removal.

1. On what evidence, 699. *Post*, XII. 1.
2. Of children.

A man having, in 1836, married a widow with children by her first husband, ran away and left them chargeable to the parish. Held, that the children above the age of nurture might, notwithstanding stat. 4 & 5 W. 4. c. 76. s. 57., be removed from their mother to the place of her first husband's settlement, though they were under the age of sixteen.

Where a child, within the age of nurture, is removed from its mother, and that fact appears upon the face of the order and in the special case, yet the Court of Queen's Bench will confirm it, unless the objection was relied upon in the notice of the grounds of appeal. *Regina v. Stafford*, 417.

X. The copy of the examinations.

1. What to be sent.

On appeal against an order of removal, it is a good objection that the copy of examination, sent to the appellants under 4 & 5 W. 4. c. 76. s. 79., does not shew that the pauper was chargeable. *Regina v. Black Callerton*, 679.

2. Must shew jurisdiction, 699. *Post*, XII. 1.

3. Construction, 685. *Post*, 8.

4. Particularity in identification of premises, 682. *Post*, XII. 3.

5. Particularity in circumstances essential to the settlement.

A copy of examination, furnished under stat. 4 & 5 W. 4. c. 76. s. 79., on removal of a pauper, does not give sufficient information of the settlement relied upon, if it merely state that the party gained a settlement by renting and occupying a tenement of J. T. (naming the landlord) in the township &c. (to which the pauper is removed), of the yearly rent of 10*l.*; no time being specified.

And, on appeal, the appellants may take advantage of such defect, though their notice of grounds of appeal state only that the order of removal, examination

mination, and notice of chargeability, are bad upon the faces thereof. *Regina v. Middleton in Teesdale*, 688.

6. Particularity as to time, 693. *Post*, XII. 4.

7. Ignorance, how far an excuse, 693. *Post*, XII. 4.

8. Variance.

Where the pauper's examination differs from his evidence at sessions, as to any circumstance making a part of the matter pointed to in the statement of grounds of appeal, it is for the sessions to decide whether the variance be material within stat. 4 & 5 W. 4. c. 76. s. 81.

So held, on application for a mandamus to enter continuances and hear an appeal.

Per Lord Denman C. J. The examination of the pauper is to be construed as strictly as the statement of grounds of appeal. *Regina v. West Riding Justices*, 685.

XI. Appeal against order.

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XII. Grounds of appeal.

1. Objections to evidence given on the examination.

The copy of examinations transmitted with an order of removal under stat. 4 & 5 W. 4. c. 76. s. 79., must shew, on the face of it, every fact necessary to give the justices jurisdiction to remove.

Where the examination shews all such particulars, and discloses no irregularity, it cannot be objected, on appeal, that the evidence was in fact inadmissible, if the objection was not made known to the justices at the examination.

Where an order of removal had been made upon the examination, regular on the face of it, of *T. B.*, which was transmitted according to stat. 4 & 5 W. 4. c. 76. s. 79., and, on appeal, the appellants offered to prove that *T. B.*, when examined, was a convicted felon: Held, that such evidence was irrelevant if offered as impeaching the examination. *Regina v. Allernun*, 699.

2. Objections on the face of the order, 417. 688. *Antè*, IX. 2. X. 5.

3. Particularity in identification.

A notice of appeal under stat. 4 & 5 W. 4. c. 76. s. 81., alleging as the ground a settlement in another parish, *T.*, is bad if it merely states that the pauper, in or about 1830, paid parochial taxes for a tenement in the parish of *T.* rented by him at 11*l.* a year, for the term of one year, and occupied by him under such hiring for one year, the rent, to the amount of 15*l.*, being paid by him; and that the pauper rented the aforesaid tenement (not describing it further), at 15*l.* a year, and occupied under that hiring for one year, and paid 10*l.* rent. The premises should be further described by giving, at any rate, the landlord's name. *Regina v. East Sussex Justices*, 682.

See also, 688. *Antè*, X. 5.

4. Particularity as to time.

In a notice of appeal under stat. 4 & 5 W. 4. c. 76. s. 81., against an order of removal, alleging, as the ground of appeal, a settlement by hiring and service, the general rule is, that the date of the service, as well as the master's name, should be stated; and that a notice omitting such date is bad. If it appear that the appellants could not ascertain it, *semble*, per Lord Denman C. J. and Littledale J., that the strict rule may be dispensed with.

Per Lord Denman C. J. and Coleridge J.: the sessions may judge whether, under the circumstances of any particular case, time is so material that the omission to specify it vitiates an examination or notice of appeal. *Regina v. Bridgewater*, 693.

5. Ignorance, 693. *Antè*, 4.

6. Variance, 685. *Antè*, X. 8.

XIII. Trial.

1. Casting vote, 706. *Antè*, VII. 2.

2. Judgment on a subsequent day, 706. *Antè*, VII. 2.

XIV. Evidence.

1. Competency, 699. *Antè*, XII. 1.

2. Presumption, 706. *Antè*, VII. 2.

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XVI. Bastardy.

The notice of an application for an order in bastardy under stat. 4 & 5 W. 4.

W. 4. c. 76. s. 75., signed by the churchwardens and overseers of the parish, is sufficient, though the parish is part of a union under sect. 26. of the Poor Law Amendment Act, and none of the guardians have signed it. *Regina v. James*, 425.

XVII. Wife's children, 417. *Autè*, IX. 2.

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- II. Compensation clauses. *Compensation*, II.
- III. Obligation to complete.

By a railway act (6 & 7 W. 4. c. cvi. local and personal, public) it was recited that the making a railway from London to Norwich and Yarmouth, passing by Colchester, &c. would be of great public advantage; and that persons named were willing at their own costs to carry the undertaking into execution. The persons named, with other shareholders, were incorporated into a company to carry the act into execution. They were authorised to raise by shares 1,600,000*l.* (which, it was recited, was the probable expense); and, in case that sum should not be sufficient, to borrow on mortgage, or raise by additional shares, 533,333*l.* The line was set out in the act, describing the places from London through Middlesex, Essex, Suffolk, and Norfolk, with two termini, one at Norwich, the other at Yarmouth. The usual powers to take lands were conferred, with power to deviate from the line to a limited extent. All the 1,600,000*l.* was to be subscribed for before the company could exercise their compulsory powers; and these powers were to cease unless executed within two years; and, if the whole work was not completed in seven years (unless prevented by inevitable accident), all their powers were to cease, except as to the part (if any) completed. If any part was abandoned, the lands were, as to that part, to vest in the owners of the lands adjoining.

By

RAILWAY, III.

By a second act, 1 & 2 *Vict. c. lxxxii.*, (local and personal, public), two years more were added to the first two years: and the company were forbidden to deviate, unless the line of deviation were set out within one year from the passing of the last act.

On application for a mandamus to the company to proceed with the whole line, setting out deviations, &c. and to purchase the necessary lands, it appearing to the Court that the affidavits shewed reasonable ground for believing that the company intended to complete the line from *London* to *Colchester* only, and to abandon the rest, the writ was granted, though the company stated that they had not, nor could raise without a new act, funds sufficient to complete the line.

The mandamus suggested that the company had been required to define the deviations, and complete the railway to *Norwich* and *Yarmouth*, but that they had refused and neglected to purchase the necessary lands between *Colchester* and *Norwich*, and *Norwich* and *Yarmouth*, or set out the deviations, or to make and complete the railway. There was no averment that the company had abandoned the design, or were not proceeding with all convenient speed, or that a reasonable time had elapsed without proper preparations, or that deviations would be expedient.

Held, that the mandamus was insufficient.

When cause is shewn against a rule for a mandamus, the objection, that no sufficient demand and refusal appear, must be taken before the merits are discussed. *Regina v. Eastern Counties Railway Company*, 551.

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SATISFACTION.

SATISFACTION.

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II. Amendment.

To scire facias by the assignees of a bankrupt on a judgment, the defendant pleaded, 1. denial of the bankruptcy; 2. satisfaction to the bankrupt; on which pleas, issues were joined. The Court permitted the proceedings to be amended on payment of costs, by joining the official assignee (who had been inadvertently omitted as a co-plaintiff), though the application had been delayed a year and a half after the issuing of the writ, the defendant being allowed to plead de novo. *Holland v. Phillips*, 149.

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Repair of sea walls: evidence.

A landowner may be liable, by prescription, to repair sea walls, though destroyed by extraordinary tempest. And therefore, on presentment against such owner, for suffering the walls to be out of repair, it ought not, in point of law, to be left as the sole question for the jury, whether the walls were in a condition to resist *ordinary* weather and tides: but it is a question to be determined on the evidence, whether the proprietor was bound to provide against the effects of ordinary tempests only, or of extraordinary ones also.

Orders of the commissioners of sewers, requiring landowners to repair and alter sea walls, may be given in evidence as adjudications, by a court of competent jurisdiction, without proof of their having been acted upon. After a considerable lapse of time (as seventy years), the Court will presume that such orders were executed. *Regina v. Leigh*, 398.

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II. His return.

1. When no estoppel, 477. *Bailiff*, III. 1.

2. Effect

2. Effect of taking out of court the amount levied.

Where the sheriff on a *fi. fa.* returns that he has levied part of the debt, and that the debtor has no goods whereof the residue can be levied; and the creditor accepts the amount levied on account, and towards payment of his debt; he is not thereby precluded from bringing an action against the sheriff for a false return. *Holmes v. Clifton*, 673.

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2. In action, for neglect to arrest.

Under stat. 2 *W. 4. c. 39.* (and see stat. 1 & 2 *Pict. c. 110. s. 3.* and sched. No. 1.), it was the duty of the sheriff executing a writ of *capias* to arrest on the first opportunity, and an action lay against him for default made before the return day of the writ, provided some actual damage resulted to the plaintiff; not otherwise. In a declaration for such default, it was not a sufficient allegation of damage to state that defendant did not arrest, &c. and wilfully neglected opportunities of doing so, and that the debtor did not put in special bail according to the exigency of the writ, whereby plaintiff was delayed in the recovery of his debt, and is likely to lose the same. But an averment that the sheriff was in default after the writ was returnable, would have implied legal damage.

Semble, that, on special demurrer, such declaration would have been bad for not averring that the sheriff had been in default more than eight days before the commencement of the suit :

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but that, on general demurrer, it was sufficient if the count alleged that the debtor had not put in special bail according to the exigency of the writ.

The declaration ought to have stated that the writ was delivered to the sheriff within four calendar months from the issuing; but, *semble*, the omission of such statement was matter of special demurrer. *Randell v. Whible*, 719.

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III. Bills for undertakings by public companies.

1. Concealment from legislature.

An agreement under seal, between plaintiff and defendants, recited: That a company had been formed for making a railway; that defendants were proprietors; that a bill had been introduced into parliament, according to which the line would pass through plaintiff's estates and near his mansion, and that he was a dissident and opposed the passing of the bill; that defendants

defendants had proposed that, if he would withdraw his opposition, and assent to the railway, they would endeavour to deviate the proposed line: and plaintiff agreed that, on condition of the stipulations in the agreement being performed, he did thereby withdraw his opposition and give his assent: and defendants covenanted that, in case the then bill should be passed in the then session, they would, in six months after it received the royal assent, pay plaintiff 5000*l.* as compensation for the damage which his residence and estates would sustain from the railway passing according to the deviated line, exclusive of, and without prejudice to, further compensation to plaintiff in the event of the deviated line not being ultimately adopted, and without prejudice to such further compensation for any damage as in the agreement after mentioned.

Plaintiff declared in debt, and averred that he withdrew his opposition to the bill, which passed into a law in the then session; that six months had since elapsed, but that defendants had not paid the 5000*l.*

Plea, that the railway, at the time of making the agreement, and according to the act, was intended to pass through lands of divers individuals; that the agreement was made privately and secretly by the parties thereto, without the consent or knowledge of the said individuals, and was concealed from them continually until the act was passed, and was not disclosed to, or known in, parliament, and was concealed from the legislature during the passing of the act; and that plaintiff, at the time of passing the act, and still, was a peer of parliament. On demurrer,

1. Held, in Q. B., that the plea was good, as shewing that the contract was a fraud on the legislature.

Judgment reversed in the Exchequer Chamber, because the record did not distinctly shew that the parties, at the time of the contract, intended it to be concealed. *Quære*, whether, if such intention had been shewn, the plea would have been good?

Held also, in the Exchequer Chamber,

2. That no fraud on the individual landholders appeared, it not being dis-

tinctly shewn that concealment from them was intended at the time of the contract. *Semble*, that even if this had appeared, there was no fraud on the landholders.

3. That the agreement was not bad on the ground of plaintiff being a peer, since it was not shewn that the money was promised as a consideration for his vote being given or withheld, and he had a right in his individual character to bargain for compensation for injury to his land. But that, if it had appeared that the money was so given, the action would have failed.

Defendants also pleaded that, after making the agreement and before action brought the company abandoned the deviated line, and in lieu thereof adopted another line, altogether out of plaintiff's lands; that they had petitioned parliament to be allowed to carry the railway along the new line, and were then making every exertion in their power to procure an act for that purpose; and that if they should obtain such act, no part of the railway would pass through plaintiff's lands.

4. Held, in Q. B., on demurrer, that the plea was no answer. *Howden (Lord) v. Simpson*, 793.

2. Concealment from other parties, 793. *Ante*, 1.

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VI. 29 *C.* 2. c. 3. (Frauds.)

1. Sec. 4. Interest in land, 753. *Vendors*, II. 3.

2. Sec. 4. Guarantee, 309. *Guarantee*, I. 3.

3. Sec. 4. Default of another.

If plaintiff become bail for a stranger, in consideration of defendant's request, and of defendant promising to indemnify plaintiff against the consequences, no action lies upon such promise unless it be in writing, under stat. 29 *C.* 2. c. 3.

c. 3. s. 4. *Green v. Cresswell*, 453.
See also, 460. *Bills*, II.

4. Sec. 17. Oral variation.

Declaration, in assumpsit, stated that plaintiff agreed to buy, and defendant to sell, a cargo to be delivered "on the 20th to the 22nd instant," to be paid for by acceptance three months from delivery; and that afterwards, before the 22d, plaintiff, at request of defendant, gave time for the delivery to the 24th; breach, that defendant, though requested (to wit, on 24th) to deliver, had not, on 24th or any other time, delivered; special damage by rise of price between the agreement and breach. Plea, that the giving of time was part of a contract for the sale of goods at the price of above 10*l.*; and that there was no part acceptance, or earnest, or note or memorandum in writing. Replication, that the giving of time was not part of the contract, &c.

It appeared that there was a written contract, as stated in the declaration, for the delivery "on the 20th to the 22d;" but, the 22d falling on *Sunday*, plaintiff, at defendant's request, verbally agreed to enlarge the time to the 23d or 24th. The price fluctuated between the time of the agreement and the 24th being higher on the last day. It was understood that the enlargement of time would postpone the delivery of the three months' acceptance.

Held, that on these facts, defendant, under stat. 29 *Car.* 2. c. 3. s. 17., was entitled to the verdict, the enlargement of time having materially varied the contract, substituting for it a new contract on a similar consideration, and not being merely a dispensation from performance on a particular day. *Stead v. Dawber*, 57.

5. Sec. 17. Sale and resale: delivery, 499. *Vendors*, III. 2.

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Sec. 6. Prisoner's remedy against gaoler, 207. *Marshal*.

IX. 18 *G.* 2. c. 9. (Stock.)

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X. 22 *G.* 2. c. 46. (Attornies.)

Sec. 14. Penalty for acting as, where defendant executed the office of deputy clerk of the peace, 76. *Penalties*.

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2. Secs. 1. 12. Extortion, 494. *Beiliff*, II. 3.

3. Sec. 11. Prisoner's remedy, 207. *Marshal*.

XII. 53 *G.* 3. c. 127. (Ecclesiastical Courts.)

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XIII. 53 *G.* 3. c. 141. (Annuities.)

Sec. 2. Setting aside substituted annuity, 412. *Annuity*.

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Effect of assignment on action previously commenced, 623. *Insolvent*, I.

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Secs. 28. 41. Summary arrest: notice of action, 582. *Bona Fides*, I.

XX. 9 *G.* 4. c. 17. (Sacramental test.)

Secs. 2, 3, 4. Declaration when to be made, 355. *Declaration*, III.

XXI. 9 *G.* 4. c. 31. (Offences against the person.)

Sec. 27. Certificate of dismissal, 635. *Assault*, II.

XXII. 11 *G.* 4. and 1 *W.* 4. c. 60. (Conveyance of estates vested in trustees.)

Sec. 8. When the Q. B. will not interfere by mandamus.

Under stat. 11 *G.* 4. and *W.* 4. c. 60. s. 8., the Court of Chancery, upon the Master's report, made an order declaring

ing that the heir of *W.*, legal tenant in fee of copyhold premises, could not be found, that *W.* held as trustee, and that *B.* was entitled to the equitable fee; and appointing *G.* trustee to convey or surrender the legal estate.

This Court refused to compel the lord, by mandamus, to accept *G.*'s surrender, on the ground that (assuming the statutes to apply to copyholds) the Court of Chancery could compel the performance of whatever was requisite, and was better able than this Court to regulate the rights of the parties.

Especially as it appeared that *B.*'s right was disputed, and that the lord seized quousque and assigned for a valuable consideration. *Regina v. Pitt*, 272.

XXIII. 11 *G.* 4. and 1 *W.* 4. c. 64. (Sale of beer.)

Sec. 14. Form of conviction, 11. *Conviction*.

XXIV. 2 *W.* 4. c. 39. (Process.)

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2. Sec. 26. Competency, 606. *Witness*, I. 2. 619. *Evidence*, II. 3.

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1. Secs. 23. 26. Rateability of union workhouse, 259. *Poor*, IV. 2.

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3. Sec. 26. Appointment of guardians, 736. *Poor*, II. 1.

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5. Sec. 57. Settlement of children of wife's former marriage, 417. *Poor*, IX. 2.

6. Sec. 79. Copy examination, 679. *Poor*, X. 1.

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XXXII. 4 & 5 *W.* 4. c. 85. (Sale of beer.)

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XXXIII. 5 & 6 *W.* 4. c. 56. (Highways.)

Sec. 109. General issue, 632. *Plea*, II. 1.

XXXIV. 5 & 6 *W.* 4. c. 76. (Municipal corporations.)

1. Sec. 9. Payment of rates.

Payment of rates, to entitle a person to be put on the burgess list of a borough, under stat. 5 & 6 *W.* 4. c. 76. s. 9., must be a payment by the party's own act. It is not sufficient that another person, without his authority, pays the rates for him.

Where a party, required by law to pronounce a decision on certain points, is brought before the Court by a motion impugning such decision, the general rule is, that he shall have costs if the application fails.

Per *Littledale J.* It is not regular to grant a single rule nisi for the issuing of several writs of mandamus. *Regina v. Bridgnorth, Mayor*, 66.

2. Sec. 25. Election of aldermen.

Where a given number of aldermen was to be elected on a given day, under stat. 5 & 6 *W.* 4. c. 76. s. 25., which prescribed no particular mode of electing (see now stat. 7 *W.* 4. and 1 *Vict.* c. 78. s. 14.), the proper mode was to put to the vote a list containing as many names as there were vacancies to be filled up, any elector being at liberty to propose and have put to the vote a list of his own. *Regina v. Brightwell*, 171.

3. Sec. 66. Jurisdiction of Lords of Treasury.

Where a party removed from a borough

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rough office under stat. 5 & 6 W. 4. c. 76., re-appointed, and afterwards dismissed, applies to the town council for compensation, which is refused, and he thereupon appeals to the Lords of the Treasury under sec. 66. of the statute, the Lords have no jurisdiction to enquire whether he was or was not removed for a sufficient cause within that section.

And therefore, where the council had refused compensation, and the Lords on appeal under sect. 66., and on inquiry into the facts leading to the dismissal, confirmed such refusal, this Court, on affidavits satisfactory to them, granted a mandamus, calling on the corporation to assess compensation, notwithstanding the judgment of the Lords. *Regina v. Warwick Corporation*, 386.

4. Sec. 66. Mandamus when refused.

The "common clerk" of a borough, before 5 & 6 W. 4. c. 76. (Municipal Corporation Act), had always executed, by himself or deputy, the offices of clerk of the peace and clerk of the justices, as incidental to that of common clerk. The first town council, elected after that act, appointed him to the office of "town clerk," which he declined to accept, on the ground that the office was essentially a different one; and he claimed compensation as upon a loss of the entire office of common clerk. The council refused any compensation; and the Lords of the Treasury, on appeal and hearing of all parties, decided that, as he was re-elected town clerk, he was not entitled to compensation for such part of his emoluments as appertained to that office; but, as he was not re-elected to the offices of clerk of the peace or clerk of the magistrates, he was entitled to compensation for the emoluments of the common clerk acting as clerk of the peace and to the justices; and they awarded to him an annuity "for the loss of his office of common clerk." Held, that the Lords had sufficiently adjudicated on the whole subject of appeal; and the Court refused a mandamus to them to hear and determine the merits of it.

If the Lords have in fact heard and determined an appeal under sec. 66. of the act, this Court will not interfere by mandamus, though it may be

satisfied that compensation has been awarded on an erroneous principle. *Regina v. Lords of the Treasury*, 179.

5. Mandamus when refused.

A town clerk who was in office at the passing of stat. 5 & 6 W. 4. c. 76., but who had been re-appointed afterwards, and subsequently dismissed by the council, applied for compensation, which the council refused. He then appealed to the Lords of the Treasury by memorial, and prayed therein to be heard by himself, his counsel, agents, or witnesses. The council sent in a memorial in answer, and the town clerk another in reply. The council, in their memorial, alleged that they had dismissed him for conduct which, they stated, warranted removal. This the town clerk denied. The Lords of the Treasury, without hearing the parties further than by taking the memorials into consideration, awarded that the town clerk was entitled to no compensation; stating as their reason, that they thought the council had made the removal in the *bonâ fide* and justifiable exercise of the discretion vested in them. On application for a mandamus to the Lords, commanding them to hear the appeal,

Held, that it could not be granted; for that, if the lords had jurisdiction (and *semble*, that they had not), they had already heard and decided.

Although the Court considered that the dismissal was not warranted by the town clerk's conduct. *Regina v. Lords of Treasury*, 374.

6. Sec. 92. What not public purposes, 281. *Post*, XXXVI.

7. Sec. 111. Jurisdiction, 711. *Poor*, VI. 1.

8. Sec. 114. Prisoners committed for trial at assizes, 740. *Gaol*.

XXXV. 6 & 7. W. 4. c. 96. (Parochial assessment.)

Secs. 1, 2, 3. Rateability of personal property, 157. *Poor*, IV. 1.

XXXVI. 7 W. 4. & 1 Vict. c. 78. (Municipal corporations.)

Sec. 44. Certiorari.

A town council ordered a payment from the borough fund, for defraying the expenses of opposing two rules, one for a quo warranto against a party who had been declared duly elected a councillor,

councillor, and had accepted the office, for exercising that office; the other for a criminal information against an alderman of the borough, for alleged misconduct at an election of councillors.

The payments were made by the treasurer, and his accounts audited. Afterwards, stat. 7 W. 4. & 1 Vict. c. 78. passed.

The Court, under sec. 44., upon the affidavit of a Burgess, who applied in pursuance of the instructions of a subsequent town council, granted a certiorari to bring up the orders of the previous town council and quashed them. *Regina v. Bridgewater (Mayor)*, &c. 281.

XXXVII. 7 W. 4. & 1 Vict. c. 80. (Usury.) p. 675. *Usury*.

XXXVIII. 1 & 2 Vict. c. 110. (Arrest.) Sec. 3. & Sched. No. 1., 719. *Sheriff*, IX. 2.

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II. Till costs are paid, 761. *Ejectment*, V. 1.

III. On terms, 71. *Forfeiture*, I. 2. *Doc dem. Gover v. Maberly*, 74 n.

STOCK.

Liability of bank after fraudulent transfer.

Case by the executors of a stockholder against the Bank of England for refusing to transfer stock of the testatrix, and to pay the dividends. It appeared that nearly all the stock had been sold and transferred in the lifetime of the testatrix by her nephew C., who had brought another woman

to personate her, and forge her signature. After the sale, testatrix had repeatedly received the warrants for the reduced dividends in person, and had signed the warrants and the bank books, being on those occasions accompanied by C., who mentioned the amount of dividend in her presence. The jury found that she had the means of knowing of the transfer, but that there was no evidence of actual knowledge; that she had been guilty of gross negligence, and that the defendants had not been guilty of any:

Held, that the facts were a defence on the plea of not guilty.

Held, also, that they furnished evidence in support of pleas denying that testatrix was proprietor of the stock, and a plea denying that sufficient money had been received by defendants for paying the dividends. *Coles v. Bank of England*, 437.

STOCK EXCHANGE.

Rules how far binding, 27. *Broker*, I. 1.

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In writ of mandamus, 531. *Railway*, III.

SURETY.

Under 1 & 2 Vict. c. 110. s. 8.

Render of principal by.

The sureties given by a trader under s. 8. of stat. 1 & 2 Vict. c. 110. (for abolition of arrest on mesne process) may discharge themselves by a render

SURETY.

of their principal after verdict against him, and before judgment. *Owston v. Coates*, 193.

SURPLUSAGE.

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Of copyhold. *Copyhold*.

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TAKING MONEY OUT OF COURT.

When no estoppel, 673. *Sheriff*, II. 2.

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I. Power to impose, 412. *Annuity*.

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I. When of the essence of a contract, 57. *Statute*, VI. 4.

II. In statement of settlement, 685. 688. 693. *Poor*, X. 5. 8. XII. 4.

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V. With reference to the necessity for a sci. fa. 570. *Arrest*, V. I.

VI. Of taking an objection, 551. *Railway*, III.

VII. In practice, 516. *Practice*.

VIII. In pleading. *Pleading*, XV.

TRESPASS, I. 1.

TITHES.

Suit for subtraction.

Effect of the pleadings in the Ecclesiastical Court.

In a suit for subtraction of tithes in the Spiritual Court by an impropriator, defendant's personal answer stated a lease of them by plaintiff to a third party, by whom they were demanded, and also that they belonged to the vicar, and not to plaintiff.

Defendant also put in a responsive allegation, that by immemorial usage, custom, and prescription, the tithes were deemed small or vicarial, and, as such, due to the vicar, and not to plaintiff.

Plaintiff's personal answer denied the usage as stated by defendant; and the judge assigned a day to hear on the sufficiency of plaintiff's answer; and term probatory to defendant.

Held that, in this stage of the cause, there was no issue on the lease; that the only matter in issue, viz. the immemorial right of the vicar, was properly cognisable by the Spiritual Court; and that there was no ground of prohibition. *Beauchamp (Earl) v. Turner*, 218.

TOWN CLERK.

Municipal Corporation.

TOWN COUNCIL.

Municipal Corporation.

TRADER.

Render by his sureties under 1 & 2 *Fict.* c. 110. s. 8. 193. *Surety*.

TRANSFER.

Of stock, fraudulent, 437. *Stock*.

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Of ancient records, 215. *Costs*, IV. 1.

TREASURY.

Lords of the Treasury.

TRESPASS.

I. When the proper remedy.

1. Trespass is the proper remedy for wrongfully continuing a building on plaintiff's

plaintiff's land, for the erection of which plaintiff has already recovered compensation; and a recovery, with satisfaction, for erecting it, does not operate as a purchase of the right to continue such erection.

Therefore, where the trustees of a turnpike road built buttresses to support it on the land of *A.*, and *A.* thereupon sued them and their workmen in trespass for such erection, and accepted money paid into Court in full satisfaction of the trespass:

Held, that, after notice to defendants to remove the buttresses, and a refusal to do so, *A.* might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar. *Holmes v. Wilson*, 503.

2. Against officer of customs for a seizure, 117. *Customs*, III.

TRIAL.

Amendment, 609. *Amendment*, I.

TROVER.

- I. Defence under plea of not possessed, 90. *Estoppel*, I. 2.
- II. Effect of real owner authorising wrong-doer to deliver goods to a claimant under a verdict against the wrong-doer, 472. *Estoppel*, I. 4.

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- I. Conveyance of estate vested in statutory trustee, 272. *Statute*, XXII.
- II. Rateability of, 259. *Poor*, IV. 2.
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USAGE.

- I. When cognisable by Ecclesiastical Court, 218. *Tithes*.
- II. Of stock exchange, 27. *Broker*, I. 1.

USER.

Bad plea of, 590. *Nuisance*, II.

USURY.

To an action by indorsee against acceptor of a bill of exchange, payable three months after date, it is no defence (since 3 & 4 W. 4. c. 98. s. 7., and 7 W. 4. & 1 Vict. c. 80.) that, defendant being indebted to plaintiff on an account stated, it was agreed between plaintiff, drawer, and defendant that plaintiff should forbear payment of the debt for three months; that defendant should pay to plaintiff a certain sum larger than interest at 5 per cent. per annum for such forbearance; that the bill should be made, accepted, and indorsed to plaintiff as a security for payment of the debt at the end of three months; and that the said sum was in fact paid by defendant, and the bill made, accepted, and indorsed to plaintiff, in pursuance of such agreement. *King v. Braddon*, 675.

VACANCY.

From omission to make declaration, 335. *Declaration*, III.

VALUE.

p. 706. *Poor*, VII. 2. 784. *Bills*, VIII. 5.

VARIANCE.

- I. In settlement cases, 685. *Poor*, X. 8.
- II. Amendment, 609. *Amendment*, I.

VARIATION.

Of written contract within Statute of Frauds, 57. *Statute*, VI. 4.

VENDORS AND PURCHASERS.

I. Generally.

Independent covenants, 50. *Post*, II. 2.

II. Sale of land.

1. Payment of compensation when not a purchase, 503. *Trespass*, I.
2. Tender of conveyance.

By articles under seal, *A.* agreed to sell, and *B.* to purchase, certain premises. *B.* therein covenanted to pay, on or before a fixed day, as the consideration for such sale and purchase, a certain sum, with interest to the time of

of the completion of the purchase, *A.* allowing thereout the same rate of interest for so much of the money as might be paid in the meanwhile; and *B.* agreed to pay for the conveyance and stamp.

Held, that the conveyance was not a condition precedent to, or concurrent with, the payment, and that *A.* might therefore sue for the purchase-money and interest without previously tendering a conveyance. *Mattock v. Kinglake*, 50.

3. What not a contract for an interest in land.

Plaintiff and defendant orally agreed (in *August*) that defendant should give 45*l.* for the crop of corn on the plaintiff's land, and the profit of the stubble afterwards; that plaintiff was to have liberty for his cattle to run with defendant's; that defendant was also to have some potatoes growing on the land, and whatever lay grass was in the fields; defendant was to harvest the corn, and dig up the potatoes; and plaintiff was to pay the tithe.

Held, that it did not appear to be the intention of the parties to contract for any interest in land, and the case was, therefore, not within the Statute of Frauds, 29 *C. 2. c. 3. s. 4.*, but a sale of goods and chattels, as to all but the lay grass, and, as to that, a contract for the agistment of defendant's cattle. *Jones v. Flint*, 753.

III. Sale of goods.

1. Cross contract subject to periodical accounts.

Plaintiff and defendant agreed that defendant should recommend customers to plaintiff, who was a tailor, and that plaintiff should allow defendant 10 per. cent. upon the business so procured, to be received in clothes by defendant from time to time, as he might want them; and that a settlement of accounts should take place between the parties every six, or, at farthest, every twelve months.

Plaintiff having sued in debt for goods sold and delivered, and having merely proved the delivery and acceptance of clothes,

Held, that he could not recover, but that, on *nunquam indebitatus*, he was bound to prove a settlement of accounts, on which the balance was in his favour.

VERDICT, I. 1, 2. II.

Semble, that had there been no stipulation as to the settlement of accounts, it would have been sufficient for plaintiff to prove the delivery and acceptance, and would have lain on defendant to prove a per-centage due to him to the amount of what was so delivered. *Garcey v. Pyke*, 512.

2. Condition or distinct contract for resale.

Plaintiff entered into a parol agreement to sell to defendant a mare for 20*l.*, subject to the condition that, if it should prove to be in foal, defendant should, on receiving 12*l.* from plaintiff, return it on request. Plaintiff delivered the mare and received 20*l.* On its proving to be in foal, he tendered to defendant 12*l.*, and requested him to return the mare, which defendant refused to do.

Held, that the contract to return it on payment of 12*l.* was not a distinct contract of sale, but one of the conditions of the original sale to defendant; and that the delivery of the mare to defendant took the whole agreement out of the Statute of Frauds, 29 *C. 2. c. 3. s. 17.*, so as to enable plaintiff to sue defendant for the refusal to return it. *Williams v. Burgess*, 499.

3. With collusion of real owner, 90. *Estoppel*, I. 2.

4. Time when of the essence, 57. *Statute*, VI. 4.

5. When binding on personal representatives of vendee, 42. *Executors*, III. 1.

6. Delivery, 499. *Antè*, 2.

7. By broker, 27. *Broker*, I. 1.

IV. Sale of stock. *Broker. Stock.*

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Presumption from. *Skuse v. Davis*, 655.

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1. Against wrong-doer, 472. *Estoppel*, I. 1.

2. Subject to a reference, 32. *Arbitration*, IX. 1. 197. *Ejectment*, II.

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Under an award, 179. *Ejectment*, II.

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III; Judgment non obstante, 121. *Payment*, IV. 2. 516. *Escape*, I. 3. 590. *Nuisance*, II. 616. *Bills*, V.

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1. In evidence, 151. *Evidence*, IX. 1. 593. *Pleading*, XVIII.
2. As an estoppel, 472. 763. *Estoppel*, I. 4. III.

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His title set up against suit by impro-
priator, 218. *Tithes*.

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p. 606. *Witness*, I. 2.

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2.

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p. 609. *Amendment*, I.

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Sca, 598. *Sewers*.

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stable*.

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- I. Or mandate, 477. *Bailiff*, III. 1.
- II. Collusive alteration of, 570. *Arrest*, V. 1.
- III. Dividend, 437. *Stock*.

WIFE.

Baron and Feme.

WILL.

I. Intention.

Point of time to which it is to be refer-
red, 228. *Post*, II.

II. Revocation.

When to be construed as only condi-
tional.

Testator devised lands to *L.* for life,
remainder to his first and other sons
and daughters successively in tail. *L.*
died, leaving one son, and one post-
humous daughter. The son died. Tes-
tatrix, being ignorant of the existence
of the daughter, made a codicil, recit-
ing the death of *L.* without leaving
any issue, and devising the land to *H.*,
in the same manner as she had before
done to *L.*: Held, that the codicil
must be construed as a conditional
revocation only, and was inoperative
as against the daughter of *L.*, though
testatrix, after making the codicil, and
two years before she died, had become
acquainted with her existence. *Doe*
dem. Evans v. Evans, 228.

WITNESS.

I. Incompetency.

1. Objection, when irrelevant, 699.
Poor, XII. 1.
2. Objection, how answered.

The objection of incompetency on
the ground of interest, arising on the
examination of a witness, may be re-
moved by the parol evidence of the
same witness that he has been re-
leased; though his interest appears on
the face of the plea which he is called
to prove.

Therefore where, in an action against
the acceptor of a bill, defendant pleaded
that it was accepted for the accommoda-
tion of the drawer, who indorsed it to
plaintiff without consideration: Held,
that the drawer, who was called by
defendant to prove the plea, and who
gave parol evidence of a release by
defendant, was competent, without
producing or formally proving the re-
lease.

Quare, whether, in such case, a re-
lease be necessary since 5 & 4 *W.* 4.
c. 42. s. 26. ? *Lunniss v. Row*, 606.

3. See also *Evidence*, II.

II. Remu-

II. Remuneration.

A party wishing to produce the roll of attorneys in the Court of Chancery as evidence on a trial in K. B., applied to the senior clerk of the Petty Bag Office to procure an order from the Master of the Rolls for their production, which was granted, according to the usual practice, and the senior clerk was then subpoenaed to produce the roll, he being the proper officer.

Held, that the clerk might claim, for attendance at the trial with such roll, not the common remuneration of a witness appearing on a subpoena duces tecum, but reasonable fees to a larger amount, which were proved to have been usually paid, for fifty years past, to clerks attending with records from the Petty Bag Office.

Although he did not, when subpoenaed, inform the party that he should demand remuneration as a clerk attending under the order of the Master of the Rolls, and not as an ordinary witness.

And although he did not produce the roll himself, but sent it by his clerk. *Bentall v. Sydney*, 162.

III. Costs, 213. *Costs*, IV. 1.

WORDS.

When they do not work a forfeiture, 427. *Forfeiture*, I. 1.

WORKHOUSE.

Rateability of, 259. *Poor*, IV. 2.

WRECK.

Subject to what duty.

A collector of customs, appointed

by the commissioners under stat. 3 & 4 W. 4. c. 51. s. 6., to collect duties on articles coming into the kingdom, and, on payment, sign bills of entry which by sect. 18. are a warrant for delivery of such articles to the party paying, is not a mere servant of the commissioners, but a substantive and immediate officer of the Crown; and his functions, as collector, are ministerial. Therefore he is liable in an action for non-feasance in the exercise of his office; as for refusing to sign such bill of entry without payment of an excessive duty.

The term "wreck" in stat. 3 & 4 W. 4. c. 52. s. 50. is not necessarily limited to goods which become forfeit to the Crown, or its grantee, by not being claimed within a year and a day according to the stat. *Westminster* 1. (3 Ed. 1. c. 4.).

Goods were imported into this country, warehoused, entered for exportation, and shipped for *Belgium*: the vessel was lost within the *English* port, and the goods, being partly thrown upon the shore, and partly found floating on the sea and landed, were conveyed to the warehouse of the lord of the manor, and immediately claimed by the owner. Held, that they were chargeable with duty as "wreck brought or coming into the United Kingdom," within stat. 3 & 4 W. 4. c. 52. s. 50. *Barry v. Arnaud*, 646.

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I. *Capias*. *Contumacy*. *Error*. *Man-damus*. *Scire Facias*.

II. Certainty in, 531. *Railway*, III.

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